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# 82-1284

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

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A.T. KNIGHT,
G. GERALD KUNES
AND
KUNES & KUNES,

Petitioners,

VERSUS

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, Pa.
and
TONEY BROTHERS BANK,
Respondents.

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

---

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A.T. KNIGHT, G. GERALD KUNES, and KUNES & KUNES, Petitioners pray for a writ of certiorari to review the granting of Summary Judgment by the United States District Court for the Northern District of Georgia, Atlanta Division, granted on October 9, 1981, and to review the Judgment of the United States Court of Appeals for the Eleventh Circuit in this case, entered on the 20th day of August, 1982 and the denial of the Motion for Rehearing by the United States Court of Appeals for the Eleventh Circuit in this case entered on October 18, 1982.

## QUESTIONS PRESENTED FOR REVIEW

This court should issue its Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit because that court

has so far sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings in granting a summary judgment against plaintiffs and in favor of defendant National Union Fire Insurance Company of Pittsburg, Pennsyvlania, as to call for an exercise of this court's power of supervision.

The District Court:

1. Disregarded the acts of the insurer which waived the insurer's right either under contract or statute to rescind its policy for fraud.

2. Placed burdens of proof, imputed knowledge of facts, failed to accept non-movant's version of the facts, or resolve all disputed matters, or draw inferences from the underlying facts in a light most favorable to the non-movant.

3. In granting its summary judgment the District Court resolved each and

every genuine factual issue and all inferences in favor of the moving party, even when there were undisputed facts from which different inferences could be drawn and as to which reasonable minds might differ.

4. Granted the summary judgment on opinion evidence.

5. Found the issue on summary judgment was the issuing of the renewal policy, and allowed the insurer to claim rescission of the renewal policy based on an alleged material misrepresentation made for a previous policy, which the materiality was waived because the insurer accepted the renewal application with the paragraph blank which would have maintained in the renewal policy representations and warranties of the old policy.

6. Did the summary judgment inaccurately hold that under McGhee v. Independent Life and Accident Ins. Co., 146 Ga.

App. 310, 246 S E 2d 349 (1978), plaintiffs could not use estoppel to create coverage where none ever existed, because on August 17, 1978 National Union rejected the May 8, 1978 claim on the exclusion of one insured against another, [App 19-20] and by this action National Union admitted Knight was an insured under the renewal policy. Should not this act bar the rescission under the doctrine of estoppel? (R-615) [App 13]

7. Did the court err in not compelling defendants to complete discovery pursuant to plaintiff's motions prior to granting summary judgment for the defendant?

8. Whether the court, under all the facts and circumstances, erred in refusing to grant plaintiff's motion for partial summary judgment on the issue of liability.

## LIST OF THE PARTIES

(1) A. T. Knight, Plaintiff

(2) G. Gerald Kunes, Plaintiff

(3) Kunes & Kunes, Plaintiff

(4) G. Gerald Kunes, Attorney for Plaintiffs, having a contingent fee contract

(5) G. G. Joseph Kunes, Jr., Attorney for the Plaintiffs, having a contingent fee contract

(6) National Union Fire Insurance Company of Pittsburg, Pa., Defendant

(7) Toney Brother's Bank, Defendant.

Attorney of Record for Plaintiffs

G. Gerald Kunes

G. GERALD KUNES

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## OPINIONS BELOW

The Summary Judgment of the District Court below is attached [appendix, Exhibit "A", infra, pages 1-16] is unreported. The opinion of the Court of Appeals below affirmed the grant of the summary judgment without opinion and is reported in 685 F.2d 1387, [appendix Exhibit "B" infra, page 17] The motion for rehearing was denied without opinion on October 18, 1982, by the Court of Appeals below and was not reported. [App 18]

## JURISDICTION

The summary judgment of the district court [app 1-16] was filed October 6, 1981. The summary judgment was affirmed by U.S. Court of Appeals for the Eleventh Circuit on August 20, 1982. A motion for rehearing was filed and was denied on October 18, 1982. Notice of appeal to this court was filed on November 11, 1982. Jurisdiction is invoked under 28 USC §1245 [1].

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Enabling Act of June 19, 1934 authorized the Supreme Court of the United States to prescribe rules of civil procedure. These rules became effective September 16, 1938 by authority of U.S.C.A. Title 28, U.S. C.A. §2072.

1. Rule 56 in its pertinent part relating to Summary Judgments is as follows:

> 56[c]..."the Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no geniune issue as to any material fact and that the moving party is entitled to a judgment as a matter of law..."

2. The statute authorizing said rule is procedural and not

substantive, and provides as follows:

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the District Courts of the United States in civil actions. Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as it come in law and as declared by the 7th amendment of the Constitution."

## STATEMENT OF THE CASE

A.T. Knight, hereinafter referred to as "Knight", sued National Union Fire Insurance Company of Pittsburgh, Pa. (hereinafter referred to as "National Union"), Toney Brother's Bank, (hereinafter referred to as the "bank") and the Federal Deposit Insurance Corporation, (hereinafter referred to as FDIC) both individually and as the receiver of Toney Brother's Bank. The action was for indemnity and damages arising out of National Union's refusal to pay under it's insurance policy "costs, charges and expenses" for defending Knight in certain actions brought against him in his capacity as an officer and director of the bank. Knight claimed coverage under a National Union Directors and Officers Liability and Corporate Reimbursement policy #651 71 27, (hereinafter

referred to as the "renewal policy") with a policy period from December 1, 1977 to December 1, 1978. This policy was a renewal of National Union's policy number 304 21 61 (hereinafter referred to as the original policy) which was effective from December 1, 1976 to December 1, 1977. Both policies were "claims made" policies. The original policy expired without a claim being made. Two claims were made under the renewal policy.

The first was made by the bank to National Union on May 8, 1978 and was for alleged wrongful acts by Knight while he was president of the bank. This claim resulted in National Union's home office claims manager, Stanley Morris, hiring an attorney in Albany, Georgia, Thomas Chambless, (hereinafter referred to as Chambless) to investigate the claim. (Morris. P. 27-29) [App 23-45] On June

30, 1978 Chambless made a 24 page report to Morris. (Morris P. 59) [App 26] On July 24, 1978 Morris, as a result of the Chambless report, suspected that the original policy had been procured by fraud, but made no further investigation. (Morris P. 63-65) [App 28-30]

On August 17, 1978 Morris wrote the bank on behalf of National Union and reaffirmed the Directors and Officers Liability coverage under policy 651 71 27, but denied the claim for acts of Knight because the policy excluded claims by one insured against another. [App 19-20] Thereafter in October of 1978 two stockholders of the bank sued National Union, Knight and a former cashier in the bank, jointly in a stockholders derivative action. After being served Knight consulted G. Gerald Kunes, an attorney. On October 18, 1978 Kunes placed a long distance phone

call to National Union's Atlanta office, for the claim's manager, and was connected with Don Browne who was the Atlanta claims manager. Kunes, who made the call for Knight said Browne consented for to pay "costs, charges and expenses" for National Union under the policy for Knight's legal defense. Later, Browne and National Union would dispute such phone call or authorization as made. (R-612 [App 9] National Union's home office claim file documents that the call was made to Browne on the date claimed, and that Browne immediately notified Morris at the home office, who immediately notified local counsel Chambless that Kunes would be representing Knight in the stockholders suit. (Morris P. 98) [App 43] Thereafter, Kunes, pursuant to Browne's instructions in representing Knight, contacted attorney

Chambless. About this same time three other stockholders filed suit against Knight, Jerry Dean Dorminey and The National City Bank of Rome in the U.S. District Court in the Northern District of Georgia alleging a 10-b-5 security violation in connection with the sale of bank's stock. These three claimants along with four other claimants and Knight had purchased 84% of the bank's stock in January of 1978 from Dorminey and the Rome bank financed the sale.

On November 1, 1978 Kunes mailed a statement for legal services to Chambless. The statement was for services rendered to October 30, 1978 in the stockholders derivative action plus a retainer for the stockholders derivative action and the securities claim. This statement was never paid because on November 2, 1978 National Union, through

its New York attorney, Gilroy, rescinded the original policy and the renewal policy as void ab initio for material misrepresentions in the applications for the original policy dated January 7, 1977 and for the renewal policy application dated September 26, 1977 both of which were signed by Knight.

The stockholders derivative action is still pending on a motion to dismiss for failure to state a claim. The 10-b-5 action was tried before a jury in Rome and resulted in a verdict to rescind the sale of the bank's stock. The court has granted a motion for new trial, which is still pending in Rome, Georgia.

After the verdict in the trial, Knight filed suit to recover "costs, charges and expenses" under the insurance policy in Count I of the complaint. Count II sought a judgment against

FDIC for damages, if National Union successfully had rescinded the policy. Count III sought damages against National Union for statutory bad faith. Count IV sought bad faith damages against FDIC, and Court V sought damages against National Union and FDIC for conspiracy. FDIC made a motion to be dismissed as a party which the court granted on August 18, 1980. National Union answered but denied liability by virtue of rescission. On May 8, 1980 National Union moved to disqualify Kunes as plaintiff's counsel. On December 23, 1980 the court granted this motion. Thereafter, Kunes and his firm made a motion to be made parties which the court granted on May 1, 1981. National Union gained considerable discovery while plaintiff was unrepresented by the court's order of December 23, 1980. Five days after the

Kunes were made parties, National Union, on May 5, 1981, moved for summary judgment. On June 1, 1981 Knight moved for a partial summary judgment on the issue of liability after depositions in New York of National Union's representives. On June 8, 29, and July 2, 1981 plaintiffs moved to compel National Union to make discovery. The court took no action on these motions until it dismissed them as moot on October 6, 1981 the date of summary judgment. On September 4, 1981 FDIC moved for the protective order. The court granted FDIC the protective order on September 21, 1981.

Both the National Union motion for summary judgment and plaintiffs motion to compel discovery were submitted to the court on June 18, 1981. The second motion to compel discovery was

submitted to the court on July 13, 1981. Neither submission was ever acted on by the court to compel National Union to make this discovery prior to granting National Union's summary judgment. The depositions taken of National Union's employees in the last week of May, 1981, in New York could not be filed in District Court prior to the grant of National Union's summary judgment because National Union employees did not, could not or would not sign them.

The court relied on unfiled testimony of Morris and Browne in granting defendants summary judgment on October 6, 1981. The court in it's letter of transmittal of the summary judgment reminded defendants to be sure to file these depositions.

The basis of National Union's

motion for summary judgment was that Knight in executing the January 7, 1977 application for the original policy answered question 14 on the application fraudulently by representing to National Union that there had never been a cease and desist order received from a regulatory authority. This was untrue because on February 27, 1976 the Georgia Department of Banking and Finance had issued a cease and desist order to Toney Brothers Bank prohibiting them from making any further loans in excess of their legal lending limit to stockholders or directors who owned more than 10% of the bank's stock. At that time Jerry D. Dorminey owned 84% of the bank's stock. At the time of the cease and desist order Knight was not a stockholder of the bank, and did not become one until January of 1978 when he and seven other individuals

purchased 84% of the bank stock from Dorminey. National Union, in its letter of rescission of November 2, 1978, did not assign as the ground of rescission, Knight's untruthful answer to question 14 of the original application, instead assigned as grounds answers to questions 18, 19 and 20 on the January 7, 1977 application. These answers to questions 18, 19 and 20 were not the ground upon which the District Court granted the summary judgment unholding the rescission of the policies by National Union.

The summary judgment was based on expert opinion testimony of National Union's Vice-president of underwriting, Cavallero, and underwriter Ratner, to the affect that the answer to cease and desist question on the original application was material to acceptance of the risk. The court also found the cease

and desist order was material on the evidence of Driscoll, an employee of Hartford Life and Accident Insurance Company, who had been the issuer of the bank's Blanket Bond until Knight notified Driscoll of the bank's receipt of the cease and desist order. The other expert opinion testimony relied upon the court in granting summary judgment was testimony of Kline who was an officer of the Georgia Department of Banking and Finance.

In opposition to National Union's motion for summary judgment plaintiffs contended that National Union had waived the materiality of the cease and desist order by not seeking up to date information of any other cease and desist orders on the renewal application of September 26, 1977, and that if failure to advise National Union of the

cease desist order was a ground of forfeiture, the forfeiture had been waived by National Union prior to the November 2, 1978 consenting to pay Knight's "costs, charges and expenses" in defending the law suits. Plaintiffs also contended that National Union accepted the September 26, 1977 renewal application with paragraph 9 unanswered by Knight. Plaintiffs further contended that National Union altered the renewal application without notice to the bank or Knight by inserting the date of 1/7/77 in the blank space in paragraph 9. Plaintiffs contended that the acceptance of the incomplete application or the alteration thereof on renewal, was a failure of the renewal application to maintain the warranties made in the original application on the renewal policy. And even if said warranties were

maintained on renewal, the materiality of the cease and desist information was waived by National Union's failure to ask any cease and desist questions on it's renewal application. Plaintiffs further contended that any forfeiture was waived by the insurer by consenting for Knight to incur "costs, charges and expenses" in defending the two actions against him, after they acquired notice on July 7, 1978 of the existence of the cease and desist order as a result of attorney Chambless' investigation of the Toney Brothers Bank claim against National Union for Knight's acts. A further waiver of the forfeiture was claimed by the plaintiffs by virtue of National Union's reaffirmance of coverage to Toney Brothers Bank when they denied the bank's claim against Knight as being excluded under the policy as being a claim of one

insured against another because the bank and Knight who were both insured's under the policy.

The District Court on October 6, 1981 granted defendant's motion for summary judgment, finding that the cease and desist order was material to acceptance of the risk on the basis of the expert opinion testimony of Cavallaro, Ratner, Driscoll and Kline and that National Union's policy number 651 71 27 was void ab initio under Georgia Code §56-2409 because of the material misrepresentations made by Knight on behalf of Toney Brothers Bank in the applications of August 3, 1976 and January 7, 1977. The court further held that the even if National Union authorized Knight to employ Kunes to represent him October 18, 1978, before declaring the policies void on November

2, 1978, National Union is not estopped from denying coverage because estoppel could not "create coverage where none ever existed." Defendant National Union Fire Insurance Company's motion for summary judgment was granted. Plaintiffs motion for partial summary judgment was denied. Plaintiffs two motions to compel discovery were dismissed as moot.

On October 26, 1981 plaintiffs appealed to U.S. Court of Appeals for the Eleventh Circuit. On November 2, 1981 the depositions of National Union's Morris and Browne were filed. The U.S. Court of Appeals for the Eleventh Circuit affirmed the grant of summary judgment without opinion on August 20, 1982. A motion for rehearing was timely made which the U.S. Court of Appeals for the Eleventh Circuit and denied on October 18, 1982. Notice of appeal to this court

was filed November 11, 1982 with the U.S. Court of Appeals for the Eleventh Circuit.

## LAW AND ARGUMENT

The parties disputed and it was a question of fact whether Knight did submit the renewal application with the date blank, in answer to paragraph 9, or whether an employee of National Union added the date "January 7, 1977" in this blank. The summary Court unjustly decided this issue of fact by finding Knight agreed [sic] some application completed some time would constitute part of the renewal policy and the two previous original applications were identical in respect to the fraud, and further Knight knew [sic] that National Union was relying on one or both of the previous applications, and the court further found the plaintiffs cannot benefit from Knight's refusal or failure to fill in the date requested, and finally, even in

absence of the date, paragraph 9 binds Knight and the bank. (R-610) [App 7]

This Court's Writ of Certiorari is required now because these issues of fact denied the Court the right to grant a motion for summary judgment. The company, by accepting an incomplete or imperfect renewal application without further inquiry waived it's right to rely on the original applications and the alleged fraudulent misstatements in the inception. Aetna Life Ins. Co. v. France, 94 US 561, 24 L ed 287, and also defendant had the burden to prove an issue of fact did not exist on motion for summary judgment. Federal Rule Civil Procedure 56 (c); Arnett v. Kennedy, 416 US 134, 139-140, 40 L ed 2d 15, 94 S Ct 1633.

The true facts of which insurer's employees had notice was was in its officers and directors underwriting manual which warned that if a renewal application was accepted without a date inserted in paragraph 9, the "warranties and

statement contained within the application attached to the insured's original policy" would not be maintained on the renewal policy. (R-363) [App 63-64] Therefore the acceptance of the renewal application was not only a waiver of the right to demand a fully executed application, Phoenix Mut. Life Ins. Co. v. Raddin, 120 US 183, 7 S Ct 500, 30 L ed 644, it also barred the defendant's reliance on the original warranties and statements on the renewal policy which was the only policy in issue according to the undisputed finding of fact by the court in the summary judgment. [R-616] [App 14]

A contract may be rescinded at the instance of the parties defrauded but in order to rescind he must promptly, upon discovery of the fraud, restore or offer to restore to the other whatever he has received, by virture of the contract, if it be of any value. Georgia Code Annotated §20-906.

It would be well at this point to bring

to the court's attention, the summary court's refusal to recognize the case of Robb v. Vos, 115 US 13, 15 S Ct 4, 39 L ed 52, which holds:

> "Any decisive act by a party with knowledge or his rights and of the facts, determines his election in a case of inconsistent remedies."

It has also been held this amounts to waiver in Kennedy v. Manry, 6 Ga. App. 816 (1909), the leading case in the country on the difference between waiver and estoppel. The case before the court involves the doctrine of waiver and estoppel. In estoppel the actors conduct may be unintentional, in waiver it must be intentional. For estoppel to result the other party must be injured or prejudiced, waiver on the other hand, may benefit the other party. Kennedy v. Manry, 6 Ga. App. 816 (1909). The insurer is bound by the acts of it's agent in changing an application after it is signed. Couch On Insurance, 2d §35; p. 261.

The summary judgment, unless reversed, is clearly contrary to the Georgia Doctrine of Waiver announced in the 1982 cases of Penn. Life Insurance Co. v. Tanner, 163 Ga. App.330, cert. denied, Georgia International Life Insurance Co. v. Bear's Den, Inc., 162 Ga. App. 833, Redmond v. Merrill Lynch Relocation Management, Inc., 163 Ga. App. 346, Rosenburg v. Liberty Mutual Insurance Co., 162 Ga. App. 561, and this court's holding of Northern Assurance Co. v. Grand View Building Association, 183, US 308, 225 S Ct 133, 46 L ed 213 (1901). A party may waive any provision either or contractual or statutory intended for it's benefit. Shutte v. Thompson, 15 Wall 151 21 L ed 123.

National Union made the following waivers of provisions intended for its benefit:

(a) In accepting the September 26, 1977 renewal application with paragraph 9 blank without objecting or requiring a completed application;

(b) By filling in the blank space in

paragraph 9 with the date 1/7/77 on the September 26 renewal application without notice to Toney Brothers Bank;

(c) By failing to promptly rescind the policy after it acquired notice of a ground of rescission on July 7, 1978; [App 30-31]

(d) By reaffirming coverage to Toney Brothers Bank on August 17, 1978 after National Union had notice of a ground upon which to rescind; [App 19-20]

(e) In consenting on October 18, 1978 for Knight to incur "costs, charges and expenses" in connection with his defense of claims brought against him as an officer and director of Toney Brothers Bank. [App 42]

National Union waived the contractual and statutory benefits intended for it and this precluded the grant of summary judgment for Nat-

ional Union on the basis of such acts amounting to acquiescence, and though the contract was originally impeachable, the contract becomes unimpeachable. Phoenix Mutual Life Insurance Co. v. Doster, 106 US 30, 1 S Ct 18, 27 L ed 65.

This court has ruled that certain acts of an insurer can amount to a "waiver by election", Hartford Life and Accident Insurance Co. v. Unsell, 144 US 439, 12 S Ct 671, 36 L ed 496.

National Union after it had notice on July 7, 1978 of a ground to rescind for fraud in the inception, waived it's right of rescission by electing instead on August 17, 1978 to reaffirm to Toney Brothers Bank the coverage under the insurance policy. [app 19-20]

On October 17, 1978 Mr. Morris, National Union's home office claims manager wrote the bank in response to a claim filed by the bank under policy for wrongful acts of Knight:

> "The National Union...provides Directors and Officer Liability

> and Corporation Reimbursement to Toney Brothers Bank...during the policy period December 1, 1977 to December 1, 1978. We received... a possible claim. We retained Waston, Spence, Lowe and Chambless...to investigate further into the matter....
>
> It would appear that the claim you have advanced in your letter clearly...falls within the exclusionary language of the endorsement above. The policy afforded by National Union Fire Insurance Company of Pittsburgh, Pa would not by its terms apply and we accordingly...must reject the claim." [App 19-20]

The insurer elected to affirm the policy after it had notice of the ground of forfeiture. The company had the same information on July 7, 1978 that it used to later rescind on. [App 38] The failure to rescind instead, of affirm on August 17, 1978 amounted to a "waiver by election." Hartford Life Insurance Co. v. Unsell, 144 US 439 12 S Ct 671, 36 L ed 496. This was a decisive act by a party with knowledge of his rights and the facts, and this determines the legal rights of the parties once and for all. Kennedy v. Manry, 6 Ga. App. 816 (1909),

Robb v. Vos, 115 US 13 15 S Ct 4, 39 L ed 52, Rowe v. Weichselbaum Co., 6 Ga. App. 504

A second waiver occurred on October 19, 1978 when Morris elected to consent to Knight hiring a lawyer. This second waiver again amounted to affirmance of the policy rather than a recision based on a knowledge of forfeiture.

> "An election once made with knowledge of the facts between coexistent remedial rights which are inconsistent is irrevokable and conclusive, irrespective of intent, and constitutes an absolute bar to a defense founded on such inconsistent rights." [emphasis ours] Rowe v. Weichselbaum Co., 3 Ga. App. 504.

This makes the granting of the summary judgment error because the court ignored the undisputed evidence in the case that the insurer consented on October 18, 1978 for the plaintiff to incur "costs, charges and expenses" pursuant to paragraph 6 of the policy. The consent was given after the insurer had notice of the ground of forfeiture on July 7 and 14 of 1978. The con-

sent was given after the insurer reaffirmed coverage and that Knight was insured under the policy in the letter of August 17, 1978 to the bank.

It is a well settled rule that a party who is entitled to rescind a contract on account of false or fraudulent representation, when he has full knowledge of all the material circumstances of the case, if he freely and advisedly does anything which amounts to a recognition of the transaction or action of a manner inconsistent with his repudiation, it amounts to acquiescence and though originally impeachable, the contract becomes unimpeachable even in equity. New York Life Insurance Co. v. Eggleston, 96 US 572, 24 L ed 841; Phoenix Mutual Life Insurance Co. v. Doster, 106 US 30, 1 S Ct 18, 27 L ed 65; Hartford Life and Accident Ins. Co. v. Unsell, 144 US 439, 12 S Ct 671, 36 L ed 496.

2. The court erred in granting a summary judgmemt because there was a genuine dispute of fact on material issues. Associated

Press v. United States, 326 US 1, 65 S Ct 1416 89 L ed 2103 (1945). The materials before the District Court having raised a genuine issue as to ultimate facts material to the issues presented, the grant of summary judgment was improper under Fed Rules Civ Proc, 56 (c). United States v. Diebold, 369 US 654, 8 L ed 2d 176, 82 S Ct 993. The District Court in granting summary judgment cast burdens of proof, as well as imputed knowledge to the plaintiff, required him to object to the alteration of the application, and presumed Knight agreed to the alteration of the renewal application by the insurer. The court obviously erred in failing to resolve all genuine disputes as to material facts in favor of the appellants in granting summary judgment for the insurer. If the court is to grant summary judgment it must resolve all genuine disputes as to material facts in favor of the appellant. Arnett v. Kennedy, 416 US 134, 139-140, 40 L ed 2d 15, 94 S Ct 1633, (1974).

The court in order to grant summary judgment against the appellant must accept his version of the facts and every other inference which could be drawn from this evidence. Bishop v. Wood, 426 US 341, 48 L ed 2d 684, 96 S Ct 2074 (1976).

The specific instances where the court erred in construing the evidence unfavorable to the appellant occurred when the court did not require evidence of the specific underwriting standards used to issue a directors and officers liability policy, nor was there evidence that cancellation of the bank's blanket bond would in any way affect the risk of an officers and directors liability policy, nor did the evidence of John B. Kline, of the Georgia Department of Banking and Finance, in any way show the issue of materiality in assuming the risk of a directors and officers liability policy.

The court found likewise found "plaintiffs have presented no evidence to controvert

these statements and on the basis on the evidence of Ratner, Cavallero, Driscoll and Kline and the undisputed fact that Hartford cancelled the bank's blanket bond," (R-609) [app 6] the court held as a matter of law that the negative response to question 14 was a material misrepresentation within the meaning of Georgia Code §56-2409. (R-610) [app 7] The court further misconstrued the evidence by finding as a fact Knight agreed [sic] on behalf of the bank that some application completed at some time would constitute part of the renewal application and would form a part of the renewal policy, While giving lip service to construing the evidence in a light most favorable to the plaintiffs, the court nevertheless construed it most favorably to the defendants by finding that therefore, Knight knew [sic] "when he filed the renewal application that National Union was relying or one or both of these previous applications, complete with material misrepresentations in issuing the renewal policy." There was no evidence that Knight was

an expert on what was or was not a material misrepresentation to acceptance of the risk of a officers and directors liability policy. The court further found that plaintiff could not benefit from plaintiff Knight's purported failure or refusal to fill in the date requested in paragraph 9 of the renewal application. There was no evidence that Knight refused to fill in the date nor was there any evidence that Knight knew which date National Union wished to rely upon in issuing the renewal policy. The proper course for the insurer to have taken would have been to have returned the renewal application to Knight after it had inserted the date and ask him to either initial the date or send him a new renewal application to sign with the information inserted the company wanted on renewal. However, the court totally ignored these options and the failure of the insurer to protect itself, but held that the negligence of the insurer was irrevelant, that it had not waived it's ground of rescission, nor did it waive the ground of

rescission for material misrepresentations in the inception by not requiring Knight to fully execute the renewal application contrary to this court's holding in Aetna Life Insurance Co. v. France, 94 US 561, 24 L ed 287. On the other hand, the trial court in granting summary judgment held that "paragraph 9 binds Knight and the bank even in the absence of this date." (R-610) [app 8]

The court further erred in holding that since the altered renewal application was attached to the renewal policy, the insured had a duty "to examine the insurance contact and to renegotiate any unacceptable terms," This is absolutely contrary to the holding of Aetna Life Insurance Co. v. France, 94 US 561, 24 L ed 287. The court further held that the failure to object to the addition of the date of January 7, 1977 to paragraph 9 provided a second independent ground to find that the misrepresentation was incorporated into the September 26, 1977 renewal application and the renewal policy itself.

This finding is also contrary to this court's finding in Aetna Life v. France, supra, and ignores the doctrine of waiver therein announced.

> "If the company was not satisfied with the qualified answer of the applicant, they should have rejected his application, having accepted it, they were bound by it." Aetna Life Insurance Co. v. France, 94 US 561, 567, 24 L ed 287, 290.

The court further erred in refusing to recognize plaintiffs argument that the failure to attach the January 7, 1977 application prevented it from being incorporated into that policy. As pointed out previously the company's act of accepting the application with paragragh 9 blank waived any information that it might have acquired, but the court refused to recognize this principle, but held that since the September 26, 1977 renewal application was attached to the renewal policy, and it incorporated by reference one or both of the earlier applications each of which contain a material misrepresentation, that this would bind the plaintiffs without reference

to whether the application was attached to the policy or not and cited Georgia cases. It should be pointed out that the cases cited by the court and relied thereon are all distinquishable from the case at bar on their facts. In granting the summary judgment for this insurer the court accepted all of the movant's contentions and rejected all of the respondent's. The court overlooked the question of whether a consent to pay "costs, charges and expenses" would be a wavier of National Union's right to rescind, or the fact that Knight was an insured by National Union's admission. The court further burdened plaintiffs with the duty to prove that the authorization to pay and it's withdrawal two weeks later prejudiced Knight.

Therefore, the court's grant of summary judgment is contrary to Rule 56 of the Rules of Civil Procedure and the decisions of this court relative to the requirements upon which summary judgment can be granted.

3. The issues of fact which the court

decided in favor of the movant were "the cease and desist misrepresentation was material to the risk of a Directors and Officers Liability Corporate Reimbursement policy." Now there was evidence that the "risk or hazard is greater insuring financial institutions and the officers and directors of financial institutions who have a history of economic and regulatory problems", and the cease and desist order "highlights a bad situation in any bank", and a cease and desist order "is not a commonplace event and is a matter of great seriousness", and that a cease and desist order is "the strongest and ultimate device that a regulatory agency has in it's supervision of a bank." However none of these opinions or conclusions individually or collectively show in any way how a cease and desist order affects the risk of insurance undertaken in a directors and officers liability policy. Nor is cancellation of a bankers blanket bond shown to be relevant to the acceptance of the risk undertaken by National Union. However, notwithstanding this

lack of evidence, the court held as a matter of law that the negative response to question 14 in the application was a material misrepresentation within the meaning of Georgia Code §56-2409.

The court further construed the evidence most favorably toward the movant by finding that, even though the application for the renewal was sent in with a blank answer to paragraph 9, nevertheless the attachment of the altered application to the renewal policy bound the bank and the plaintiffs without reference to whether the material misrepresentation was waived by the insurer by accepting an incomplete application. The court also found that "the parties agree that any such 'authorization' was revoked by a letter from National Union's lawyer to Toney Brothers Bank dated November 2, 1978 declaring the policy void ab initio." No such evidence of any such agreement exists. This finding by the court is totally contrary to the evidence and represents an impermissable finding of fact which is not supported by any evidence. The court further found

favorably for the insurer that it was not estopped from denying coverage after reaffirming coverage to the bank and consenting for Knight to employ an attorney. National Union's act of denying the claim of May 8, 1978 on the ground Knight was an insured is the basis for an estoppel, however, the court found no estoppel. The court further construed testimony of Stanley Morris favorably toward the insurer in granting summary judgment, but ignored such evidence of Morris which corroborated the plaintiff's contention that authorization to defend Knight was given by National Union. (Morris Dep. 95-96, 97-99, 117) [app 40-45] The court also found Browne's authorization did not estop National Union from declaring the rescission. The court in making these findings overlooked National Union's reaffirmance of the policy of insurance on August 17, 1978 and it's consent to Knight on October 18, 1978. The court's various findings that no estoppel resulted is contrary to this court's holding in Union Mutual Insurance Co.

v. Mowry, 96 US 544, 547, 24 L ed 674, 676, where this court ruled:

> "An estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact, to a present or past state of things."

An estoppel operates where it relates to an existing right and is made to influence others and by which they have been induced to act, in this case the bank's acceptance of the claim denial.

> The doctrine of estoppel is applied with respect to the representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them."

The court in holding that there was no estoppel by National Union, overlooks the fact that even though no prejudice may have been shown to Knight, when the insurer had Kunes disqualified as counsel and the court allowed Kunes to enter as a party, this then brought Kunes into

the case as a party plaintiff and the insurer's conduct which led Kunes to rely on the representation that they would pay Knight's attorneys fees created an estoppel from which the insurer could not retreat and thereafter deny its obligation to pay for Knight's defense. These issues were overlooked by the court in granting summary judgment.

Likewise the court construed Georgia Code §56-2409 in favor of the insurer when it held that this code section automatically made the policy void, not voidable at the option of the insurer. The court overlooked in this regard the waiver by, or the estoppel of the insurer of its statutory right to declare the policy void. Shutte v. Thompson, 15 Wall 151, 21 L ed 123

4. The court clearly created error when it granted the summary judgment on opinion evidence. Sartor v. Arkansas Natural Gas Corporation, 321 US 620 88 L ed 967, 64 S Ct 724, (1944). The court further committed error in granting a summary judgment based on opinions of

experts who had relations with the defendant or other corporations engaged in similar business, because such testimony is open to suspicision of bias Santor, supra. The Santor court further held that summary judgment is not warranted where undisputed facts lead to the existence of a cause of action dependent on questions which are reserved from the summary judgment process by provisions of Rule 56 of the Federal Rules of Civil Procedure. The grant of summary judgment should be reversed.

5. The basic difference between estoppel and waiver is that in waiver the act is the intentional relinquishment of a known right whereas estoppel results from an unintentional act which prejudices or causes another to act in reliance upon such intentional act. In wavier there is no prejudice required, although it may exist. Wavier is a fact provable by parole evidence as well as by writing, for the obvious reason that it could be done without writing. Knickerbocker Life Insurance Co. v. Norton, 96

US 234, 24 L ed 689. In this case the insurer's waiver is by both means. On August 18, 1978 Morris waived the forfeiture for the policy for misrepresentation by writing the bank reaffirming coverage in denying the claim. If the policy was void ab initio movant knew it then. He acquired no more information. [App 38] On October 18, 1978 Browne and Morris waived the forfeiture by consenting for Knight to incur "costs, charges and expenses." The Court erred in not seizing on these waivers to avoid the forfeiture.

6. Forfeitures are not favored in the law. Knickerbocker Life Insurance v. Norton, 96 US 234, 24 L ed 689.

> "Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party as relied and acted. Any agreement, declaration or course of action, on the part of an insurance company, which leads a party insured honestly to believe that conforming thereto a forfeiture of his policy will not be incurred, followed by due conforming on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed

under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture. New York Life Insurance Co. v. Eggleston, 96 US 577 24 L ed 843.

The court further erred in not finding a waiver of the forfeiture because this court has held that forfeitures are not favored in the law; and that courts are always prompt to seize hold of any circumstances that indicate election to waive a forfeiture or an agreement to do so on which the party has relied or acted. Knickerbocker Insurance Co. v. Norton, 96 US 234, 24 L ed 689.

A further question of waiver or estoppel was raised by the acceptance of the application for the insurance with a question not answered or imperfectly answered, and the company issued the policy without further inquiry it was held to be a waiver of the warranty of the imperfection which act by the insurer renders immaterial the ommission to answer the question more fully. Phoenix Mutual Life Insurance Co. v. Raddin, 120 US 183, 7 S Ct 500, 30 L ed 644.

The court below also refused to follow

Robb v. Vos, 115 US 13, 15 S Ct 4, 39 L ed 52, when the insurance company had waived a remedy with knowledge of the facts and the court below later allowed the insurer to recall it's waiver. This is contrary to this court's previous ruling in the Vos case above.

Likewise, the court below refused to treat the insurers reaffirmation of coverage to the bank on August 17, 1978 after the company had notice of the ground to rescind, as a "waiver by election" and this was contrary to this court's holding in Hartford Life & Accident Insurance Co. v. Unsell, 144 US 439, 12 S Ct 671, 36 L ed 496, as well as this court's doctrine of waiver announced in Northern Assurance Co. v. Grand View Building Association, 183 US 308, 225 S Ct 133, 46 L ed 213 (1901). Nor did the court below follow this court's decision in Barker v. Wingo, 407 US 514, 92 S Ct 2128, 33 L ed 101, which announced the doctrine of waiver as an intentional relinquishment or abandonment of a known right or privilege. Nor did the court

below find that the insurer's waiver was a bar to a defense which the insurer had waived, under the doctrine of Reynolds v. Bruce, 12 Pet 497, 9 L ed 1171 and Lucas v. Brooks, 18 Wall 436, 21 L ed 779. Nor did the court follow Shutte v. Thompson, 151, 121 L ed 123, which holds a party may waive any provison, either contractual or statutory intended for his benefit. Nor did the court follow the rule of Phoenix Life Insurance Co. v. Raddin, 120 US 183, 7 S Ct 500, 30 L ed 644, or Aetna Life Insurance Co. v. France, 94 US, 561 24 L ed 287, which held that acceptance by the insurer of the incomplete or imperfect application waives the insurers right to further rely on any information which would have been forthcoming had the insurer insisted upon a completed application.

It is respectfully submitted that the District Court totally confused the law of waiver and misapplied the doctrine of estoppel.

7. The court was obligated to assist plaintiff in compelling discovery Rule 37 Federal

Rules Civ Proc. Failure to compel discovery prior to grant of summary judgment was prejudical.

8. In view of what has been said above the trial court erred in failing to grant the plaintiff's motion for partial summary judgment on the issue of liability. There was no dispute that at all times relevant Knight was a director and officer of the insured bank, and that the insurance company waived the materiality of the cease and desist order by accepting the incomplete renewal application with paragraph 9 blank There was no dispute that the insurer learned on July 7, 1978 that a cease and desist order had been issued to the bank, or that on July 14, 1978 the insurer was concerned about the procurement of the policy. [App 28] Nor was there a dispute that on August 17, 1978 the insurer claimed Knight as its insured in denying the claim and reaffirming the insurance coverage to the Toney Brothers Bank. Nor was there any dispute that on October 18, 1978 the insurer was contacted by Knight's attorney con-

cerning the stockholders derivative action, or that the insurer authorized Knight to incur "costs, charges and expenses." Nor was there any dispute that pursuant to such consent Kunes proceeded to represent Knight and that the "costs, charges and expenses" were incurred. Nor was there any dispute that the insurer did not seize upon the forfeiture until four months after it had notice of it's right to rescind, and that such rescission was after it had reaffirmed policy coverage to Knight to incur "costs, charges and expenses." Under these facts and circumstances the plaintiffs motion for partial summary judgment should have been granted.

For these reasons this court should order the grant of summary judgment to the plaintiff as a necessary preliminary adjudication whose purpose would be to speed up the litigation by eliminating before trial matters wherein there is no genuine issue of fact. The rule provides that a "summary judgment, interlocutory in character, may be rendered on the issue of liability

alone or although there is a genuine issue as to the amount of damages." Federal Rules Civil Procedure Rule 56(c).

The insureds acts waived contractual and statutory rights, this makes the trial court's judgment denying plaintiffs motion for partial summary judgment error. It should be reversed on remand.

## CONCLUSION

Certiorari should be granted in this case because the district court has unaccountably and peculiarly departed from law and custom by failing to resolve disputes of fact on material issues on defendant's motion for summary judgment. Under 56 of the Federal Rules of Civil Procedure a summary judgment cannont be granted where genuine issued of fact remain. Specific acts of the insurer resulted in a waiver of the company's right to rescind it's renewal policy, and resulted the disputed material issues of facts.

The question of waiver by the insurer

of it's right to rescind is a question of fact which the court did not decide on summary judgment. This application for certiorari is required by the court's failure to dispose of this and other factual issues before granting summary judgment for the defendant. The decision deals with a great many facts but unfortunately ignores all the principles of law, and this court should exercise it's power of supervision to correct this error.

No matter how many facts may point to a conclusion as a matter of law, a party need only raise one issue of fact to survive summary judgment, Pantor v. Marshall Field & Co., 646 F 2d 271, cert denied.

Another compelling reason for the certiorari is the Eleventh Circuit panel summarily denied the appellate hearing to correct the trial court's errors. This appears to be a severe dereliction of it's duty and puts the burden on this court to correct not only error by the trial court, but also the apparent error of the Appellate Court.

It is respectfully submitted that issues of fact remain in this case, and therefore each and every judgment of the court below should be reversed and on remand it should be ordered that the District Court's grant of summary judgment for the insurer be reversed and denied, and that the plaintiff's motion for partial summary judgment as to liability be reversed and granted, and that the plaintiff's motions to compel discovery be granted.

Respectfully Submitted

Kunes & Kunes

BY: D. Gerald Kunes

Attorney for Petitioners

## APPENDIX

Listed below are relevant docket entries, relevant pleadings, findings, conclusions, opinions, judgment order and decision, and other parts of the record to which the parties wish to direct the Court's attention.


Judge's Decision on Motion for Summary Judgment, dated October 6, 1981..... A-1 through A-16

Judgment of Court of Appeals Affirming Summary Judgment, dated August 20, 1982..... A-17

Denial of Motion for Rehearing, dated October 18, 1982..... A-18

Letter dated August 17, 1978 from Morris to Bank denying Bank's claim for acts of Knight (Exhibit Numbers 00507 & 00508)..... A-19 & A-20

Letter of rescission to Toney Brothers Bank, dated 11/2/78 (Exhibit Numbers 00508 & 00509) as referred to in Morris deposition, page 68)..... A-21, A-22

Morris deposition, pages 26, 27, 28, 29, 59, 62-65, 68-75, 87, 95-99 and 117 (Exhibit "D")..... A-23 through A-45

Altered renewal application dated September 26, 1977, with 1/7/77 date inserted (Exhibit Numbers NUFO-178, 179, 180 & 181)..... A-46 through A-49

Quaif deposition, pages 16, 17 & 18 (Exhibit "C"..... A-50 through A-52

Renewal application dated September 26, 1977, as signed by A. T. Knight (Exhibit Numbers 10190-Q-3-A, B, C & D) as referred to in Quaif deposition, pages 16, 17 & 18..... A-53 through A-56

Exhibit Numbers 1-65-Q-3, 4, 5, 6, 7 & 8, as referred to in Quaif deposition, pages 16, 17 & 18..... A-57 through A-62

Exhibit "E" - Required Underwriting Information from defendant's Director's & Officers Underwriting Manual (R-363)..... A-63, A-64

Notice Of Appeal To The Supreme Court Of The United States, dated November 11, 1982..... A-65

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ALTANTA DIVISION

| | | |
|---|---|---|
| A. T. KNIGHT, G. GERALD KUNES, and KUNES AND KUNES | § | |
| vs. | § | CIVIL ACTION No. C80-300A |
| NATIONAL UNION FIRE INSURANCE COMPANY of PITTSBURGH, PA., et al. | § | |

ORDER

This action is a dispute over the coverage of an insurance policy. It is before the Court on a Motion for Summary Judgment by Defendant National Union Fire Insurance Company, a Motion for Partial Summary Judgment by Plaintiffs, and two Motions to Compel Discovery by Plaintiffs.

The Court finds the following material facts to be undisputed: Plaintiff A. T. Knight was at all relevant times an officer and director of

Defendant Toney Brothers Bank ("the Bank"). On February 27, 1976, the Georgia Department of Banking and Finance issued a Cease and Desist Order to Toney Brothers Bank concerning its practice of permitting the indebtedness of a director to exceed the limit on loans to a single borrower imposed by Ga. Code §41A-1306 (b). On March 12, 1976, Knight acknowledged receipt of the Cease and Desist order by letter to the Department of Banking and Finance. On March 18, 1976, Knight notified the Hartford Accident and Indemnity Company, which had issued a Blanket Bankers Bond to Toney Brothers Bank, of the existence of the Cease and Desist Order; Hartford immediately cancelled the Bond.

On August 3, 1976, Toney Brothers Bank filed an application with Defendant National Union Fire

Insurance Company ("National Union") for Directors and Officers Legal Liability Coverage. On January 7, 1977, Toney Brothers Bank filed a second *application [606] on an identical form with National Union. Both applications were signed by Knight on behalf of Toney Brothers Bank. Question 14 of each application inquired, "Has this Financial Institution ever received a Cease and Desist Order from any Supervisory Authority? If so, give details." On both applications, Knight responded "No." National Union issued Directors and Officers Liability and Corporation Reimbursement Policy Number 304 21 61, effective December 1, 1976 to December 1, 1977, in reliance on the information contained in one or both of these applications. Toney Brothers never filed any claim with National Union under

this policy. This policy bears a notation on its first page that it was typed out on January 21, 1977.

On September 26, 1977, Knight submitted a renewal application on behalf of the Bank to National Union. Paragraph 9 of that application read as follows:

> It is agreed that this renewal application is a supplement to the application completed on _____ and that application together with this renewal supplement constitute the complete application that shall be the basis of the contract and will be attached to and form part of the policy.

In reliance on representations in the renewal application and the initial applications, National Union issued to Toney Brothers Bank the policy at issue in this case, policy number 651 71 27 (the "renewal policy"), which was to have been effective from December 1, 1977 to

December 1, 1978. When this policy was issued, the renewal application was attached to it, but neither of the original applications were.

On October 18, 1978, Knight employed Plaintiffs G. Gerald Kunes and Kunes & Kunes (collectively "Kunes") to represent him in a lawsuit brought against Knight, National Union and another director of Toney Brothers Bank by two stockholders of the Bank. Kunes had been Knight's personal lawyer for several years. Kunes later represented Knight in other lawsuits brought against him concerning his handling of Bank affairs. On November 2, 1978, by letter from *its [607] counsel to Toney Brothers Bank, National Union notified the Bank of its decision to treat policy number 651 71 27 as void ab initio on the basis of

"material representations in the application forms... of January 7, 1977 and September 26, 1977." That letter went on to state:

> While the misrepresentations are not limited to the responses to questions 18, 19 and 20 of the January application, we refer you to the responses in question for specific instances of material misrepresentations. Among other things, it is the position of the National Union that loans to directors individually or to the corporations or other firms in which any director had more than a 10% interest are not fully set forth in the application form.

Question 18 of the January 7, 1977 application requested information regarding loans to directors and corporations in which directors owned more than a 10% interest; the Bank had provided a schedule of such loans, which National Union apparently thought inadequate. National Union's letter of November 2,

1978 enclosed a check for the amount of premium paid by Toney Brothers Bank and the interest thereon. Toney Brothers Bank refused the tendered check. The Bank later failed and was taken over by the Federal Deposit Insurance Corporation, which ultimately accepted the returned premium on the Banks' behalf.

On the basis of these indisputed facts, National Union moves for summary judgment on the basis of Ga. Code §56-2409. that statute provides in relevant part:

> Misrepresentations, omissions, concealment of facts, and incorrect statements [in an application for insurance] shall not prevent a recovery under the policy or contract unless:
> (1) Fraudulent; or
> (2) Material either to the acceptance of the risk, or to the hazard assumed by the insurer....

National Union agrues that Knight's negative response to question 14 on the January 7, 1977 application was material misrepresentation within the meaning of Ga. Code §56-2409(2) which rendered the insurance contract void ab initio. Plaintiffs have responded to National Union's Motion for Summary Judgment by *filing a Motion for Partial [608] Summary Judgment on liability alone, in which they contend that National Union has refused to pay properly submitted claims on a valid policy, and is estopped from claiming that the renewal policy was void ab initio.

Plaintiffs do not dispute that Knight's response on behalf of the Bank to question 14 on the August 3, 1976 and January 7, 1977 applications was a misrepresentation. A Cease and Desist Order had been

issued by the Georgia Department of Banking and Finance against the Bank. Knight's knowledge of the Order is indicated by his acknowledge of receipt and by his notification to the Bank's Blanket Bond insurer.

In a recent interpretation of Ga. Code ¶56-2409, the Georgia Supreme Court stated that "materiality" is a question of law for the court to decide if the evidence excludes every reasonable inference except that a misrepresentation is material. United Family Life Insurance Co. v. Shirley, 242 Ga. 235, 236, 248 S.E. 2d 635 (1978). The courts of Georgia are not reluctant to decide that a misrepresentation is material as a matter of law after finding that no other reasonable inference is possible; see, e.g., New York Life Insurance Co. v. Schneider, 155 Ga. App. 768, 770-71, 272

S.E. 2d 739 (1980); Prudential Insurance Co. v. Perry, 121 Ga. App. 618, 626-27 (1970) and cases cited therein. See also Davis v. Integon Life Insurance Corp., 645 F. 2d 494, 498 (5th Cir. 1981) (holding that misrepresentations regarding insured's medical history are "fraudulent" within the meaning of Ga. Code §56-2409(1) as a matter of law.)

National Union has presented evidence from three separate sources that the existence of a Cease and Desist Order is material to an insurer's decision to issue a policy. First, two National Union employees have testified by affidavit that the existence of the Cease and Desist Order was important enough to have influenced National Union's decision to insure Toney Brothers Bank. The National Union underwriter principally responsible for the con-*sideration [609]

of the Bank's initial application has testified that the existence of the Cease and Desist Order "shows that Toney Brothers Bank constituted a significantly greater risk than was indicated by the January 7, 1977 application," and that National Union would not have issued the initial policy had it known about the Order. Affidavit of David Ratner dated April 27, 1981 at ¶7. National Union's Senior Vice President in charge of the Underwriting Department has testified that "there is a much greater risk or hazard in insuring financial institutions and the officers and directors of financial institutions who have a history of economic and regulatory problems." Affidavit of Christopher Cavallaro dated April 27, 1981 at ¶3. Cavallaro further testified that "it would be contrary to the underwriting standards applied by

National Union Fire Insurance Company of Pittsburgh, Pa. to issue a directors and officers liability policy such as the policies issued to Toney Brothers Bank to a financial institution having the problems indicated in the cease and desist order." Id. at ¶7. Second, Hartford Accident and Indemnity company cancelled the Bank's Blanket Bond upon receiving notification of the issuance of the Cease and Desist Order, and the Hartford official who made the decision to cancel has testified that he did so because the Order "highlights a bad situation in any bank." Deposition of William Driscoll at 11. Finally, the Director of Bank Supervision of the Georgia Department of Banking and Finance has testified that the issuance of a Cease and Desist Order by his Department is not a commonplace event and

is a matter of great seriousness. Deposition of John B. Kline at 43. Kline further testified that the issuance of a Cease and Desist Order is "the strongest and the ultimate device that a regulatory agency has in its supervision of a bank." Id. at 69 Plaintiffs have presented no evidence to controvert these statements. On the basis of the evidence of Ratner, Cavallaro, Driscoll and Kline, two of whom are disinterested witnesses, and the undisputed fact that Hartford Accident and Indemnity Company cancelled the Bank's Blanket Bond *upon notification of the issuance of the Cease and [610] Desist Order, the Court holds as a matter of law that the negative response to question 14 on the applications of August 3, 1976 and January 7, 1977 was a material misrepresentation within the meaning of Ga. Code §56-2409.

In response to National Union's section 56-2409 argument, Plaintiffs contend that the misrepresentation in January 7, 1977 application related only to the original policy and not to the renewal policy at issue here. They base this argument on their contention that when Knight submitted the renewal application he did not fill in the blank left for the date of the original application in paragraph 9 of the renewal application, and that an employee of Naional Union later added the date "January 7, 1977" in this blank. This contention is disputed by National Union; see National Union's Response to Plaintiff's Motion for Partial Summary Judgment filed June 1, 1981 at ¶5. For purposes of National Union's summary judgment motion, the Court must consider the evidence in the light most favorable to Plaintiffs, National Screen Service Corp.

v. Poster Exchange, Inc., 305 F. 2d 647, 651 (1962), and the Court will therefore accept Plaintiff's contention. Even so, Plaintiff's argument fails. By signing the September 26, 1977 renewal application, Knight agreed on behalf of the Bank that some application completed at some time would constitute part of the renewal appliand would form part of the renewal policy. The Bank had filed only two previous applications with National Union, on August 3, 1976 and January 7, 1977, and those applications contained identical material misrepresentions. Therefore, Knight knew when he filed the renewal application that National Union was relying on one or both of these previous applications, complete with material misrepresentations, in issuing the renewal policy. Plaintiffs cannot

benefit from Plaintiff Knight's purported failure or refusal to fill in the date requested in paragraph 9 of the renewal application; paragraph 9 binds Knight and the Bank even in the absence of this date. *Furthermore, the insurance broker [611] who obtained the renewal policy for the Bank has testified that when National Union issued the policy and sent it to the Bank, it had a copy of the renewal application attached to it, and the copy had the paragraph 9 blank filled in with the date January 7, 1977. Deposition of Alan S. Quaif at 30-31. Plaintiffs do not dispute this testimony. Plaintiffs' Response to Defendants' Supplemental Brief filed June 30, 1981, at 2. The application stated in paragraph 9 that it formed part of the policy, yet neither Knight nor Toney Brothers Bank ever objected to the alleged addition by National Union of the date January 7, 1977 to the blank in paragraph 9. Under Georgia law,

the insured has a duty to examine the insurance contract and to renegotiate any unacceptable terms, because the insured will be bound by the terms of the contract. Barnes v. Mangham, 153 Ga. App. 540, 540, 265 S.E. 2d 867 (1980); Georgia Mutual Insurance Co. v. Meadors, 138 Ga. App. 486 487, 226 S.E. 2d 318 (1976); Parris & Son, Inc. v. Campbell, 128 Ga. App. 165, 173-74, 196 S.E. 2d 334 (1973). The Court holds that the failure of Knight and Toney Brothers Bank to examine the renewal policy and to object to the alleged addition of the date January 7, 1977 to paragraph 9 of the attached renewal application provides a second, independant ground on which to find that the misrepresentation in the January 7, 1977 application was incorporated into the September 26, 1977 renewal applica-

tion and the renewal policy itself.

Plaintiffs further argue that National Union's failure to attach the January 7, 1977 application to the renewal policy prevented it from being incorporated into that policy. This argument fails for two reasons. First, the September 26, 1977 renewal application was attached to the renewal policy, and it incorporated by reference one or both of the earlier applications, each of which contained a material misrepresentation. Second, Georgia courts have often applied Ga. Code § 56-2409(2) to void insurance policies for material misrepresentations without reference to whether the appli-*cation was attached to the policy, [612] see, e.g., Phillips v. Old Republic Life Insurance Co., 155 Ga. App. 537, 539-40, 271 S.E.2d 676 (1980); Jefferson Standard Life Insurance Co. v. Bridges, 147 Ga. App. 5, 6, 248 S.E.2d 5 (1978), and

have specifically held with regard to fradulent representations that failure to attach the application to the policy does not bar the insurer's claim that the policy was void ab initio. Johnson v. American National Life Insurance Co., 134 Ga. 800, 802-03, 68 S.E. 731 (1910); National Life & Accident Insurance Co., v. Roberts, 60 Ga. App. 317, 322, 3 S.E.2d 761 (1939).

Even if Knight and Toney Brothers Bank made a material misrepresentation sufficient to render the renewal policy void ab initio, Plaintiffs argue that National Union is estopped from refusing to pay their claims because it undertook Knight's defense without reserving its right to dispute coverage, and later abandoned it in midstream. This contention is the basis for Plain-

tiffs' Motion for Partial Summary Judgment. Plaintiffs base this argument on a phone conversation between Kunes and Donald Browne, the Atlanta claims manager for National Union. Kunes argues that he informed Browne on Knight's behalf of the filing of a state court action against Knight, Toney Brothers Bank and another Bank officer by two stockholders of the Bank. Browne's response, according to Kunes, was to authorize Knight to employ Kunes to defend Knight in the action, and that National Union would pay 95% of the attorney's fees. Affidavit of G. Gerald Kunes dated May 13, 1981 at ¶7-10. National Union disputes this contention, pointing to Browne's deposition testimony that he recalls no such conversation and would not have made such an authorization. Deposition of Donald H. Browne at 30-31. Again, the Court will adopt

Plaintiffs' version for purposes of this Order. National Screen Service Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962). The parties agree that any such "authorization" was revoked by a letter from National Union's lawyer to Toney Brothers Bank dated November 2, 1978 declaring the policy void ab initio.

*Under Georgia law, a [613] statement by the insurer's employee or agent that a loss is covered does not estop the insurer from later denying coverage. St. Paul Fire & Marine Insurance Co. v. Purdy, 129 Ga. App. 356, 357, 199 S.E.2d 567 (1973); Parris & Son, Inc. v. Campbell, 128 Ga. App. 165, 168-69, 196 S.E. 2d 334 (1973) and cases cited therein. Estoppel arises only where an insurer with knowledge of a ground of non-coverage assumes the defense of an action against an insured without reserv-

ing its rights to later assert non-coverage against the insured. Jones v. Georgia Casualty & Surety Co., 89 Ga. App. 181, 1985, 78 S.E.2d 861 (1953). Even if the conversation between Kunes and Browne did occur, National Union asserts that it did not actually assume the defense merely by authorizing Knight to employ his own attorney. Furthermore, National Union argues that even if an estoppel arose, it cannot result in the provision of coverage that never existed.

Before estoppel results, Jones requires that the insurance company "assumes and conducts the defense of an action brought against the insured"; the insurance company in Jones assumed full control of the defense." 89 Ga. App. at 185 (emphasis added). The "assumes and conducts" language is generally specifically quoted or repeated in later cases

concerning this issue. E.g., Richmond v. Georgia Farm Bureau Mutual Insurance Co. 140 Ga. App. 215, 217, 231 S.E. 2d 245 (1976); Gant v. State Farm Mutual Automobile Insurance, Co., 109 Ga. App. 41, 43, 134 S.E.2d 886 (1964); State Farm Mutual Automobile Inusurance Co. v. Anderson, 104 Ga. App. 815, 818, 123 S.E. 2d 191 (1961). National Union argues that Browne's alleged authorization to Knight to employ Kunes, which was withdrawn two weeks later when National Union notified Toney Brothers Bank that it considered the policy void ab initio, does not constitute the "conducting" of Knight's defense in the state court lawsuit.

The renewal policy at issue here neither requires no permits National Union to assume and conduct the defense of Knight and Toney Brothers Bank. Instead, it proves in ¶6 entitled *"Costs, [614]

A-11 continued

Charges and Expenses and Defense," as follows:

> No costs, charges and expenses shall be incurred without [National Union's] consent which shall not be unreasonably withheld; however, in the event of such consent being given, [National Union] will pay... 95% of all such costs...

The policy contemplated that National Union's only involvement in the defense of Knight would be initially to approve Knight's selection of a lawyer to defend him and ultimately to pay 95% of the attorney's fees and related expenses. The manager of National Union's directors and officers liability claims division has testified on behalf of National Union that this is the standard procedure by which National Union handles a directors and officers liability claim. Deposition of National Union Fire Insurance Company by Stanley Morris at 95-96.

The Georgia Court of Appeals appears to interpret "assumes and conducts the defense" as "engag[ing] the services of counsel who have filed pleadings and are defending the damage action." Gant v. State Farm Mutual Automobile Insurance Co., 109 Ga. App. 41, 43, 434 S.E.2d 886 (1964); see also the language of Jones, quoted above. It is undisputed that Kunes actually represented Knight in the several actions filed against him, that it was Knight who retained Kunes, and that National Union never interfered or attempted to influence Kunes' defense of Knight during the two weeks that the alleged authorization was in effect. Nor do Plaintiffs argue that National Union's November 2, 1978 declaration that the policy was void ab initio in any way affected Kunes' handling of Knight's various defenses; the dispute between

Plaintiffs and National Union concerns who will pay for those defenses, not how they were conducted. The Court therefore finds that, even if Browne did authorize Kunes to represent Knight, National Union did not "assume and conduct" Knight's defenses in the manner required by the Georiga courts to create estoppel.

*Furthermore, even if the [615] Court held that the authorization was sufficient to create an estoppel, Plaintiffs have failed to prove that Kunes' defense of Knight was in any way affected by the authorization or its withdrawal two weeks later. For an estoppel to arise from an insurer's conduct of a defense, prejudice to the insured must be present. Home Indemnity Co. v. Godley, 122 Ga. App. 356, 361, 177 S.E.2d 105 (1970). On the basis of these two independant theories, the Court holds that

Browne's alleged authorization of Knight's employment of Kunes in one state court action could not estop National Union from declaring on November 2, 1978 that the renewal policy is void ab initio.

There is yet another reason why the estoppel argument cannot save plaintiffs. Under Georgia law, even if an estoppel were to arise, it could not be used to create coverage that never existed. In McGhee v. Independent Life & Accident Insurance Co., 146 Ga. App. 310, 246 S.E.2d 349 (1978), the court held that certain misrepresentations regarding the insured's medical history were material as a matter of law and made the policy voidable at the option of the insurance company under Ga. Code §56-2409. 146 Ga. App. at 311. The court then rejected the insured's argument that the insurance

company was estopped from denying coverage because of alleged statements by the insurance company's agent that coverage was in effect, holding, "The doctrine[s] of implied waiver and of estoppel, based upon the conduct or action of the insurer, or its agent, are not available to bring within the coverage of a policy risks not covered by its terms, or risks excluded therefrom." Id., quoting Ballinger v. C & S Bank, 139 Ga. App. 686, 689, 229 S.E. 2d 498, 501 (1976). See also Ballinger, supra, and cases cited therein; Keaton v. Paul Revere Life Insurance Co., 648 F.2d 299, 304 (5th Cir. 1981) and cases cited therein. Plaintiffs here seek to use the estoppel doctrine to create coverage where none ever existed because of the action of Ga. Code §56-2409; under McGhee, however, a Georgia court would reject this argument, and so must this Court.

*Plaintiffs raise several [616] other arguments in their voluminous filings concerning the cross motions for summary judgment. They argue, for example, that National Union could not have relied on the January 7, 1977 application in issuing the inititial policy, which was effective from December 1, 1976 to December 1, 1977. The answers to this are three-fold: there already existed on December 1, 1976 another application containing an identical misrepresentation; it appears from the face of the initial policy that it was not typed up until January 21, 1977; and, most importantly, it is National Union's reliance in issuing the renewal policy that is at issue here. Plaintiffs' further arguments include at least the following: National Union cannot rely on the misrepresentation concerning the

existence of a Cease and Desist Order because it was not specifically mentioned in the November 2, 1978 letter as one of the grounds for declaring the policy void ab initio; National Union is estopped from denying coverage because it had notice on June 30, 1978 of irregularities at Toney Brothers Bank but did not declare the policy void for four months; and the policy is still valid because the returned premium was not accepted by the Bank during the term of the renewal policy. The Court finds these arguments and all others raised by Plaintiff to be without merit.

On the basis of the foregoing analysis, the Court holds that National Union's policy number 651 71 27 was void ab initio under Ga. Code §56-2409 because of the material misrepresentations made by Knight on behalf of Toney Brothers

Bank in the applications of August 3, 1976 and January 7, 1977. The Court further holds that even if National Union authorized Knight to employ Kunes to represent him on October 18, 1978, before declaring the policies void on November 2, 1978, National Union is not estopped from denying coverage. Defendant National Union Fire Insurance Company's Motion for Summary Judgment is GRANTED. Plaintiffs' Motion for Partial Summary Judgment is DENIED. Plaintiffs' two Motions to Compel are DISMISSED as moot.

*As a result of this Order, [617] the only remaining Defendant is Toney Brothers Bank. However, the Plaintiffs have never served the Bank with a summons and complaint in this action. Therefore, Plaintiff's claims against said Defendant are hereby DISMISSED for want of prosecution Local Rule 131.11 Final judgment

shall be entered in favor of Defendant National Union Fire Insurance Company of Pittsburgh, Pa.

SO ORDERED, this 16th day of October, 1981.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 81-7865
Non-Argument Calendar*

---

A. T. KNIGHT, G. GERALD KUNES
and KUNES & KUNES,
Plaintiffs-Appellants,

versus

NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA and TONEY BROTHERS BANK,
Defendants-Appellees.

---

Appeal from the United States District
Court for the Northern District of Georgia

---

(August 20, 1982)

BEFORE TJOFLAT, FAY and HENDERSON, Circuit Judges.

PER CURIAM:

The summary judgment appealed is affirmed based upon the Order entered by the United States District Court on October 6, 1981.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 81-7865

---

A. T. KNIGHT, et al,
Plaintiffs-Appellants,

versus

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, et al,
Defendants-Appellees.

---

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING
( )

Before TJOFLAT, FAY and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

National Union Fire Insurance Company
of Pittsburgh, Pa.
102 Maiden Lane New York, N.Y. 10005
212/791-7000 -7856

A Member Company of
American International Group

August 17, 1978

Lonnie C. Blalock, Jr.
President
Toney Brothers Bank
P. O. Box 68
Doerun, Georgia 31744

Re: Claim No.: 01-6160-651-7127
Insured: Toney Brothers Bank
Directors & Officers Liability

Dear Mr. Blalock:

The National Union Fire Insurance Company of Pittsburgh, Pa. provides Directors and Officers Liability and Corporation Reimbursement insurance to Toney Brothers Bank and its present subsidiaries during the policy period December 1, 1977 to December 1, 1978. We received telephone reports of a possible claim. We retained Watson, Spence, Love and Chambless of Albany, Georgia to investigate further into the matter. You have had certain discussions with Mr. Chambless and we have been provided with a copy of your letter of June 23, 1978 together with the attached "Directors and Officers claim."

The claim set forth in your letter and further detailed in the attachment to the letter would be a claim against certain officers and directors of the Bank by the Bank. We can only draw your attention to Endorsement #9 of the policy which states:

> "In consideration of the premium charge, it is hereby agreed that the Insurer shall not be liable to make any payment for loss as defined in Item 2(c) under this policy in connection with any claim or claims made against the Insureds by an Insured as defined in this policy, including the company named in Item #1 of the Declarations, except for stockholders' derivative actions brought by a shareholder of the company other than an Insured."

The company named in Item #1 of the Declarations is Toney Brothers Bank and its present subsidiaries.

00557

EXHIBIT "B" A-19

It would appear that the claim you have advanced in your letter clearly falls within the exclusionary language of the endorsement quoted above. The policy afforded by National Union Fire Insurance Company of Pittsburgh, Pa. would not by its terms apply and we accordingly must reject the claim.

Very truly yours,

Stanley Morris
Secretary

SM/dc

cc: Alan S. Quaif
Overseas & Domestic Underwriters Ltd.
3384 Peachtree Road, N.E.
Atlanta, Georgia 30326

Thomas S. Chambless, Esq.
Watson, Spence, Lowe & Chambless
320 Residence Avenue at North Jefferson St.
Albany, Georgia 31702

Robert P. Costin
Brewster Costin, Inc.
325 North Main Street
Moultrie, Georgia 31768

LAW OFFICES
OF
D'AMATO & LYNCH
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ROBERT E. MESHEL
ROBERT GILROY
PETER J. THUMSER
ROBERT M. MALLA

KENNETH A. SAGAT
ROBERT D. DONNEY
ROBERT P. O'NEILL
HOWARD WILDMAN
DAVID J. RITCHIE
MARK B. ROTH
L. STEPHEN SAVITT
TED J. TAYENBRUN
ANDREW R. SIMMONDS
PAUL A. IMMERMAN
JONATHAN M. PLASSE
JAMES P. DOWD
ALFRED A. D'AGOSTINO, JR.
ROBERT W. LANG
JOHN P. HIGGINS

November 2, 1978

Att' Stanley Morris

RECEIVED
NOV 06 1978
S. MORRIS

TONEY BROTHERS BANK
P.O. Box 68
Doerun, Georgia 31744

Re: Policy No.: 6517127
Claim No.: 01-6160-6517127
Insured: Toney Brothers Bank
Directors and Officers Liability
Our Ref.: 12060-893

Dear Sirs:

We represent the National Union Fire Insurance Company of Pittsburgh, Pa. which provided Toney Brothers Bank and its present subsidiaries with Directors and Officers Liability and Corporation Reinbursement insurance during the policy period December 1, 1977 to December 1, 1978. The policy number is 3842161. The policy was a renewal of policy number 6517127.

It is the position of the National Union that the policies in question were procured on the basis of material misrepresentations in the application forms and in the financial statements submitted with the application forms. The application forms are those of January 7, 1977 and September 26, 1977, both signed by Mr. Knight. The January 7, 1977 form is incorporated in the application form of September 26, 1977 by virtue of Item 9 of the September 26 application. While the misrepresentations are not limited to the responses to questions 18, 19 and 20 of the January application, we refer you to the responses in question for specific instances of material misrepresentation. Among other things, it is the position of the National Union



11/6 A-21

that loans to directors individually or to the corporations or other firms in which any director had more than a 10% interest are not fully set forth in the application form. The responses to questions 19 and 20 speak for themselves.

Because of material misrepresentations in the procurement of the policy, the National Union hereby elects to rescind. It is the position of the National Union that the policy is void ab initio.

We enclose herewith American Home Assurance Company check number 78335 dated November 3, 1978 and drawn to the order of Toney Brothers Bank in the amount of $13,574.00. This check represents a return of premium together with interest.

Very truly yours,

Robert Gilroy

:cd

Enclosure

cc: Mr. Robert P. Costin
BREWER COSTIN, INC.
325 North Main Street
P.O. Box 928
Moultrie, Georgia 31768

cc: Mr. Alan Qualif
OVERSEAS & DOMESTIC
UNDERWRITERS, LTD.
3384 Peachtree Road, N.E.
Atlanta, Georgia 30326

A It has been in use.

Q Up at the top there, if you will, I think NU stands for National Union. Is that correct?

A Correct.

Q And, of course, insured's name is Toney Brothers Bank. You have a code 29.

What does that mean?

A That is a code for National Union; it is the company code. Each company has its own code.

Q What company code is that particular 29 in National Union?

A That is National Union Fire Insurance Company. Now American Home would have another code.

Q In other words, the code is not National Union's code, it is just a code for the company.

A It is a code that designates the company that issued the policy that is involved in this file.

Q The producer's code, who does that refer to?

A I am not an expert on codes. There is all kinds of coding in here which is necessary for the appropriate records, but which are not meaningful to me.

Q It says date of accident, 5/8/78.

What is supposed to have happened on May 8, 1978?

A That is the date we received notice of this

matter.

Q By what vehicle did you receive the notice?

A I must refer to my file.

There was a telephone call from a Mr. Quaif on May 8, 1978.

Q What document number is that you are reading from, sir?

A This is 00354.

MR. TODD: It is at the very bottom of the stack.

Q That message was a telephone message that you received or that one of your girls received?

A One of my girls received this message.

Q Does Ga mean Georgia holding?

A It means Georgia. I don't understand the holding part of that. Maybe he was holding -- no, it couldn't be. I don't know what that holding means.

Q At that time had any formal claim form been sent to you?

A No -- well, let me rephrase that. None had been received by me.

Q Did you subsequently receive one in writing?

A We did receive correspondence, yes.

Q What document number is that?

A Document number 00351 from Mr. Quaif. It is a

letter that I received on May 12, 1978.

Q That was accompanied by a letter from Mr. Robert B. Costin.

A That's correct.

Q Mr. Costin attached a letter from Mr. Lonnie Blalock.

A That's correct.

Q Sir, did you subsequently receive in response to Mr. Blalock's letter of April 28, 1978 any written claim form from Toney Brothers Bank?

A No.

Q Did you at any time ever find out what loans Mr. Blalock was referring to that Mr. Knight and Mr. Jackson made?

A Yes.

Q Was that on one of your claim forms from Toney Brothers Bank?

A No.

Q When did you discover what these loans were?

A We had retained counsel, Tom Chambless, to contact Mr. Blalock to get further details.

Q Did Mr. Chambless advise youwhich loans they were talking about?

A He sent us a report dealing with a number of

loans, yes.

Q Is that included in here?

A Yes, sir.

Q What number is that, please, sir?

A That would start with 00311 and run through 00335. That was sent to us with Mr. Chambless' letter of June 30, which is 00309 and 00310.

Q So that Mr. Chambless actually provided the notice of the claim to National Union after you hired him; is that correct?

A Yes. We had hired him to investigate.

Q You hired him in May of '78; is that correct?

A Yes.

Q What was the date of that letter to you concerning those loans?

A June 30, 1978.

Q Is this the first time you had used Mr. Chambless?

A I don't know.

Q I am talking about you for officers and directors claims.

A Yes, the first time in connection with an officers and directors claim.

Q Going back to your abstract sheet over there, sir, I see a description of risk. It says, limit $1 million.

O.K.

A Correct.

Q What facts do you see in that paragraph that prove that Tom was a silent partner in a business that the bank had made a loan to?

A Mr. Blalock says, "I already knew that Tom was a silent partner in the corporation. He had a good package deal going," et cetera.

Q Does Mr. Chambless anywhere in these 24 pages of legal size typewritten material in any way document that conclusion of Mr. Blalock?

A There is no documentation attached, no.

Q Does this report show who the other principals were in the Mini-Marts?

A There is reference to Art Thompson, I believe.

Q Did Mr. Chambless or anyone on your behalf make an inquiry of Mr. Art Thompson as to whether or not this was true?

A I have no information that they did.

Q Isn't it true that Mr. Chambless asked Mr. Blalock where Mr. Thompson could be located and it is contained in this 24 pages of legal typing?

A It may be.

Q Isn't it right up there on the top of page 2,

as directors and officers claim, in which he lists a number of items totaling some $207,000 which he seems to feel represents losses sustained by the bank due to the activities of Messrs. Knight and Jackson.

I was concerned about the adequacy of the investigation, I was concerned about the question of whether or not we did have in fact a valid policy in effect.

My file contains a memorandum that I wrote to Mr. Gilroy on July 11. I had received the report from Mr. Chambless on July 7, 1978. I need to retreat again.

I had written to Bob Gilroy on July 7, 1978 stating that I had just been through Mr. Chambless' report and that I expected to have Mr. Gilroy's comments and I stated, "It seems to me we need much more detail, but I am not sure we can get it very quickly. I am interested in our original inception date of December 1, '76 as it relates to whatever went on."

I think you should understand that at that point we were concerned with respect to the procurement of our policy and we come to my memo of July 11, 1978 and I obviously had decided that Mr. Gilroy needed the underwriting file for review and I obviously had procured it again and I provided him with copies of both policies and pointed out that the application had been executed by Mr. Knight.

I have a notation in my file dated July 24, '78 --

Q What number of these documents?

A This last one is 00568. It is one of my rare notes to the file, I am afraid.

Q Go ahead. You don't need to wait on me.

A I think that note reflects my concern that we were not developing all of the information that was desirable and does reflect that at that time we were concerned as to whether or not our policy had been properly procured.

Q That was as of what date, sir?

A That is as of July 24, 1978.

Q On July 24, 1978 you were concerned about whether or not there were material misrepresentations in the application.

A Precisely, and prior.

Q Subsequent to July 24, 1978, what documentation do you have of any investigation you made or had made on behalf of National Union to substantiate any of the charges that Mr. Blalock has brought concerning Mr. Knight or Mr. Jackson?

A I have no such documentation.

Q Has any such inquiry in fact been made, to your knowledge?

A I do not know.

Q By that do you mean --

A I don't know what was attempted. I have no reports of any results.

Q In other words, so far as your knowledge is concerned, there was none. I am not --

A I have no results. I don't know what attempts may have been made.

MR. LAMB: Are you including discovery in this action?

MR. KUNES: No.

Q I am talking about from July 24 up until the date you rescinded the policy.

A I believe what I am trying to say is that I was concerned about getting the information. I thought that the proper action by me in order to obtain it was in place.

I have got Gilroy working on it, I have got Chambless working on it. They know what our problem is.

Q They knew on July 24, 1978 what your problem was.

My question very simply is, then, between July 24, 1978 and November 2, 1978, did Mr. Gilroy give you any additional factual information to back up Mr. Blalock's claims.

A No.

Q Did Mr. Chambless give you any information to

back up Mr. Blalock's claims?

A No.

Q So that on November 2, 1978 when the policy was rescinded it was rescinded upon information that you had in the file which we have already gone over from Mr. Chambless and from Mr. Blalock's report to National Union.

A Yes.

Q Now, then, I believe you said you have been a claims man for 30 years.

A Longer than I can remember. I guess it is 30 years. It might be 35.

Q Have you in the past used investigative adjusters to develop information that you needed to substantiate a conclusion which someone else has said to you as a fact?

A Yes.

Q Did you, between the time of July 24, 1978 and November 2, 1978, have people available who could also have substantiated or proven such was or was not the fact?

A I don't believe that I felt that I could get anybody better qualified to do so than Mr. Chambless.

Q I didn't mean that.

My question is, you did have someone who could have found these facts out for you and reported the truth or untruth of the claims. Could you not?

I believe the cease-and-desist order is question number 14 on the application, is that correct, or do you need to refer to it?

A I need to look. Yes, that's number 14.

Q That question was answered no.

A That's correct.

Q From Mr. Blalock's conversation with Mr. Chambless on June 30, 1978 by letter he advised National Union that there was a cease-and-desist order outstanding; did he not?

A That's correct.

Q Refer to Mr. Gilroy's letter and, if you will, give us the number that you have on the bottom of Mr. Gilroy's letter.

A 00508 and 509.

Q I believe Mr. Gilroy refers to the January 7, 1977 application signed by Mr. Knight; does he not?

A He does.

Q Is that the January 7, 1977 application that you have on your policy in front of you?

A That's correct.

Q What numbers are they, sir?

A 280, 281 and 282.

Q Again referring to Mr. Gilroy's letter, I believe Mr. Gilroy is incorporating the January 7, '77

answers by virtue of item number 9 of the September 26, 1977 application and he says, "While the misrepresentations are not limited to the responses to questions 18, 19 and 20 of the January application, we refer you to the responses in question for specific instances of material misrepresentation."

Those are specific instances of material misrepresentation. On that date you also knew about the cease-and-desist order; did you not?

A We knew there was a cease-and-desist order in effect, yes.

Q Further quoting from Mr. Gilroy's letter, "Among other things, it is the position of the National Union that loans to directors individually or to the corporations or other firms in which any director had more than 10 percent interest are not fully set forth in the application form. The responses to questions 19 and 20 speak for themselves."

What are questions 19 and 20 on that application of January 7, 19777

A Question 19 asks, "Has there been or is there now pending any claim against any person proposed for insurance in their capacity of either director or officer of the above financial institution?"

Q Did you in your information from Mr. Chambless

or in any information Mr. Gilroy may have given you learn of any claim against any such person which made the answer to that question incorrect?

A At this point I know of none.

Q What is question number 20, please, sir?

A Number 20 asks, "Does any director or officer have knowledge or information of any act, error, or omission which might give rise to a claim under the proposed policy?"

Q How is that answered?

A "No."

Q I believe you stated you are familiar with that first policy.

Doesn't it exclude coverage prior to December 1, 1976?

A No.

Q The first policy does not exclude losses occurring prior to the inception date?

A The first policy does not exclude loss arising from acts preceding December 1, 1976, if that is your question, sir.

Q Wouldn't it by policy terms exclude any coverage or acts which were done prior to the existence of the insurance?

A No.

Q You mean that that insurance policy would insure for errors and omissions which occurred prior to December 1, 1976.

A It could.

Q Under what circumstances?

A Assuming that the person did not have any knowledge of it. This policy is a claims made policy. It covers acts going back to the creation of the world except that we do not buy things that people knew about. You can't insure a fire that has already happened.

Q Explain for me the difference between a claims made policy and an ordinary policy.

A By its terms it is applicable to terms made while the policy is in effect unless otherwise excluded.

Q What about claims arising after December 1, 1977?

A There would be no coverage.

Q So that the first policy covered from the beginning of time until December 1, 1977.

A That's correct.

Q After 1977 it provided no coverage.

A That's correct.

Q Unless a claim were made within the policy year.

A That's correct.

Q Is that also true of the second policy?

A That's correct.

Q Now, with regard to Mr. Gilroy's letter, he also relates to responses to question number 18 on the January 7 policy.

If you would, read that to us and tell us what his answer was to that.

A Question number 18; is that correct?

Q Yes, sir.

A That is in two parts. A. "Are there any outstanding loans to directors individually or to corporations or other firms in which any director has more than a 10 percent interest?" The answer is yes. "If yes, describe fully the nature, amount and current status on a separate sheet."

I do not see the separate sheet.

Q Is that the reason that that question was included, because you don't have the second sheet?

A I'm sorry?

Q Is that the ground upon which Mr. Gilroy is referring to question 18, that there is no second sheet attached?

A I doubt that. I presume that there was a sheet attached and it isn't here.

Q You are not saying that you weren't given the second sheet.

A No, I am not saying that at all. I don't know whether there is one.

Q Of course, I am sure Mr. Gilroy can answer this a little more fully.

A I am sure he can, and when you get into the underwriting file you will find specifically whether it exists.

Q I am sure it exists. My only reason for asking about this right now is that I am trying to determine, since you don't have a copy of it attached to your file, if that was the reason you were claiming that there was a misrepresentation in not giving you that information.

A No, I don't believe that is the basis for it.

Q Nowhere in Mr. Gilroy's letter does he refer to the alleged misrepresentation in answer to question 14.

A I don't think at that point -- strike out the word "think" -- at that point we were not aware that there had been a cease-and-desist order in existence prior to the completion of this application.

Q Didn't you just say a moment ago that this first policy was going to cover all omissions from the beginning of time up to the end of the policy period?

A Unless otherwise excluded.

Q I will ask you to refer to page 4 of Mr.

Chambless' letter to you, which is 00314, and ask you if on that page he does not advise the bank that they are operating under a cease-and-desist order.

A The entire sentence is, "We had just had an audit by the state and we were operating under a cease-and-desist order from both the FDIC and the state."

It indicates that at least at this point in time there is in existence a cease-and-desist order.

Q From both the FDIC and the state.

A Apparently so.

Q Referring you to your copy number 307, which is a hand memo to Bob Gilroy dated 7/7/78, the first, "We need to consider" -- I can't read that writing there.

A "We need to consider the reserve."

Q That is the one we are talking about where it was first to $35,000 and then raised to $100,000 and then to $200,000.

A Yes. It went to $100,000

Q Then it went to $200,000.

A Yes, at the end of the year.

Q Then the second says, "We need to consider underwriting action."

Does that mean that you have a policy against underwriting errors?

A No. I think that this is saying we have got a problem, it may be void ab initio, it may need to be cancelled because of the problems they have got, we need to do something.

Q So far as you know, other than writing the letter of July 7 and the handwritten memo of July 24, '78 to Mr. Gilroy, nothing else was done until November 2 when the policy was cancelled, rescinded.

A I know of no information that was received.

Q I can't help but admire your next phrase in that letter. It looks like, "We are insuring some black hats now."

A Yes.

Q What is the connotation that we can have an explanation for from those words?

A Well, in a cowboy movie the good guys wear white hats and the bad guys wear black hats and the connotation was that we had some bad guys.

Q Again in your 30 years of experience you have run across black hats before; have you not?

A Yes.

Q In your insurance claims?

A Yes.

Q And you have paid on behalf of the black hats because the white hats very seldom have claims; is that

MR. LAMB: I will object to that question and instruct him not to answer it.

You are asking him about legal positions taken presumably under Georgia law with which this witness is not familiar. He is not a lawyer and you are asking him to conclude whether knowledge that Mr. Knight may or may not have had affects the legal validity of the policy based upon failure to disclose that knowledge.

This witness is not competent to render legal opinions. I will object to the form and instruct him not to answer.

MR. KUNES: Let me rephrase it.

Q Did you make the decision to rescind this policy as being void ab initio?

A Yes.

Q Did you make up that ground that we have just discussed, huge overdrafts, as one of the grounds on which the policy was rescinded as being void ab initio?

A I believe that this is properly characterized, this list, as representing the pieces of the whole pie that indicates that there were improper activities going on.

Q Then let me go back and clarify that because that wasn't what I was trying to arrive at. I was trying to get each and every ground that you were contending you had a

Q Have you ever had a previous occasion where National Union was sued jointly with an officer or director which it had insured?

A I don't know whether we have had a previous occasion. We have had a subsequent occasion.

Q Let me ask you this: When you are made a party defendant to a lawsuit with an officer and director, what is your procedure with regard to handling the claim?

A Well, we would retain counsel to represent the insurance company.

Q That was Mr. Chambless in this case; is that correct?

A Yes.

Q With regard to the officer or director who is sued, what do you do for him?

A You know, it just does not normally occur this way. If I may simply describe the manner in which a D & O case is normally approached, perhaps it will fit the picture.

Normally, of course, we are notified of litigation which will include directors or officers of a corporation as defendants and unless we have reason to believe that the people involved understand the operation of the policy we do contact them as promptly as possible to make certain that they do understand that the policy does not include a defense

obligation, that their obligation under the policy is to provide us with notice and secure our consent before incurring expense and we tell people what that really means is decide who your lawyer is going to be and let us know who it is. If we have any objection to your retention of that attorney, if we think you have made a mistake, we will let you know.

Then we proceed with the further handling of the matter. The most important thing in that point is to make certain that proper representation is obtained and that a proper appearance is made.

Q So that you or National Union does not hire the defense lawyer for the director who is the defendant --

A That is really the point of everything I just said.

Q And he hires his lawyer and National Union subsequently pays him, pays the lawyer according to the terms of the policy.

A According to the terms of the policy, yes.

Q You are really talking about two different lawyers because you got the National Union lawyer, who is Mr. Chambless, and then you have the officers and directors lawyer, who is "supposedly me," as being two different lawyers who both are "supposedly to get paid by National Union."

A Possibly you.



HENRY JACOBS ASSOCIATES, INC.

Q I am going to again refer to number 246 --

A Those are the yellow sheets that were on the top?

Q Yes.

A Yes.

Q I am referring to 246, which I think is page 1.

A Yes, sir.

Q On 10/19/78 Don Brown called you and told you that I had contacted him as Knight's attorney and was going to handle Knight's case; did he not?

A Yes.

Q At that time did you tell Mr. Brown to tell Mr. Knight that I was unsatisfactory?

A No.

Q Did you tell Mr. Brown to tell me that I was unsatisfactory?

A No.

Q Did you at that time think I was unsatisfactory?

A No.

Q Then I believe you also, on that same day, called Mr. Chambless and told Mr. Chambless that Mr. Chambless would be hearing from me.

A My recollection is that I didn't reach Mr. Chambless, but that I left a message with the female who answered the phone.



HENRY JACOBS ASSOCIATES, INC.

Q And told her to tell Mr. Chambless that Mr. Chambless would be hearing from me.

A That's correct.

Q You put it down on your paper as, "Hear from Knight's attorney."

A Yes.

Q That was on 10/19/78, the day after I called Mr. Brown.

A Yes.

Q On 10/26/78 Mr. Chambless wrote Mr. Lang.

Who is Mr. Lang?

A Mr. Lang is an associate in the firm of D'Amato & Lynch.

Q He is in with Mr. Gilroy.

A That's right. He works closely with him.

Q They are the National Union lawyers here in New York.

A Yes.

Q Mr. Chambless told Mr. Lang that I was representing Knight and I had called to let him know, him being Mr. Chambless, that you would be hearing from Knight's attorney; is that correct?

A I had called Mr. Chambless to let Mr. Chambless know that he would be hearing from you, yes, and Mr. Chambless'

letter I believe confirms that.

Yes, Mr. Chambless' letter of October 26, 1978, which is marked 00518, although he does say the same thing -- no. It is 518 to Lang. In his second paragraph he says, "I received a telephone message several days ago from Mr. Stanley Morris indicating that an attorney for Mr. Knight would be contacting me, but to date I have heard nothing."

Q So that prior to November 2, 1978 when this policy was rescinded void ab initio you knew that I had been hired to represent Mr. Knight in this litigation.

A Yes.

Q And that your Atlanta office had relayed that information to you.

A Yes.

Q That person was Don Brown.

A Yes.

Q And you relayed the information on to Mr. Chambless who is a lawyer in Albany, Georgia.

A That's correct.

Q And he later wrote back to you that I was representing Mr. Knight in the letter of 10/26/78; is that correct?

A Yes, sir.

Q You have already stated, I believe, that Mr. Chambless sent back my bill in previous testimony.

Q Have you ever been in underwriting, Mr. Morris?

A No, I have not.

MR. KUNES: Let's take a break for a while.

(A short recess was taken.)

Q Mr. Morris, I am sure you can understand a country boy from Tifton, Georgia is not too bright. I don't mean to belabor this point, but I still don't understand how we go about hiring a lawyer for your director insured.

How should I have been hired?

A I think you were hired properly by Mr. Knight.

Q And had the insurance been effective, then National Union would have recognized --

A Well, our contract would not be with you I don't believe; it would be with either the bank or Mr. Knight depending upon whether or not the bank had indemnified Mr. Knight and it would be either Mr. Knight or the bank that would make claim against the policy for the attorney's fees.

Q Then the attorney's fees would be paid to the policy holder or the director.

A I think that's optional however you work it out at the time the funds are being transferred. You normally are dealing with more solvent organizations than Toney Brothers, you normally are dealing with corporations who have paid their lawyers and paid the lawyers who are representing

# NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

A CAPITAL STOCK COMPANY

102 MAIDEN LANE, NEW YORK, N. Y. 10006

## DIRECTORS AND OFFICERS LEGAL LIABILITY RENEWAL APPLICATION

Rival
Policy # 3842161
Dec 1, 1977-78

1. (a) Corporation Name— Toney Brothers Bank
   (b) State of Incorporation— Ga.
   (c) State of Principal operation— Ga.

2. Address: PO Box 68
   Doerun, Ga. 31744

3. Amount of Insurance presently carried $ 1,000,000 Retention $ 5,000

   (a) Amount of Insurance desired on renewal. Self Insured Retention $ _____
   Same

4. Attach copies of latest Annual Report.

5. If there has been a change, copy (Certified by Corporate Secretary) of the indemnification provision in the By Laws.

6. Complete list of all subsidiary corporations and percentage owned:

   NONE

7. Complete list of all Directors of parent company by name and affiliation with other Corporations.

   See schedule 1

8. Complete list of all Officers of parent company by name and affiliation with other Corporations:

   See schedule 2

9. It is agreed that this renewal application is a supplement to the application completed on 1/7/77 and that application together with this renewal supplement constitute the complete application that shall be the basis of the contract and will be attached to and form part of the policy.

10. It is agreed that the Corporation will file with National Union Fire Insurance Company of Pittsburgh, Pa., as soon as the same became available, a copy of each registration statement and annual or interim report which the Corporation may from time to time file with the Securities and Exchange Commission.

Form 8853

A-46

THE UNDERSIGNED AUTHORIZED OFFICER OF THE CORPORATION DECLARES THAT TO THE BEST OF HIS KNOWLEDGE THE STATEMENTS SET FORTH ARE TRUE.

SIGNING OF THIS APPLICATION DOES NOT BIND THE UNDERSIGNED TO COMPLETE THE INSURANCE, BUT IT IS AGREED THAT THIS FORM SHALL BE THE BASIS OF THE CONTRACT SHOULD A POLICY BE ISSUED, AND IT WILL BE ATTACHED TO THE POLICY.

TONEY BROTHERS BANK
Doerun, Georgia

Signed By: _____ PRESIDENT

Attest _____ Title PRESIDENT

_____ CASHIER Corporation Toney Brothers Bank

Broker BREWER-COSPER Inc
P.O Box 928

Date 9-21-77
(Corporate Seal)

Address Moultrie, GA 31768

MUST BE SIGNED BY PRESIDENT OR CHAIRMAN OF THE BOARD

IF AN ORDER IS RECEIVED THE APPLICATION IS ATTACHED TO THE POLICY, SO IT IS NECESSARY THAT ALL QUESTIONS BE ANSWERED IN DETAIL.

Form 311

MUNICIPAL BOND QUESTIONNAIRE

1. The total investments in municipal bonds found in banks investment portfolio.

$243,849.76.

2. Total dollar amount of any municipal bonds purchased in the past six months.

None.

3. Any New York City or New York State bonds purchased in the past six months. None.

4. Total dollar amount of New York City or New York State bonds purchased at any time in investment portfolio.

None.

IF YOU ANSWER "YES" TO QUESTION #3 or #4, WE ALSO MUST KNOW THE PURCHASE DATE, MATURITY DATE AND FACE VALUE OF BONDS.

None

5. Are there any bond holdings or securities in the banks' portfolio that are currently in default? If so, please advise details and date they went into default.

None

Toney Brothers Bank

Sept. 26. 1977

Schedule 1

| | |
|---|---|
| F. Donal Brown- | President, Brown Milling Co. |
| A.T. Knight | Toney Brothers Bank |
| Fred Park | Owner- Fred Park Department Store |
| Rance J. Taylor | Farmer |
| Wm. L. Taylor | Toney Bros. Enterprises |
| Charles Everett | Farmer |
| A. H. Fussell | Livestock grower |

Schedule 2

| | |
|---|---|
| F. Donald Brown- | Chairman of the Board |
| A.T. Knight | President and Chief Executive Officer |
| Marguerite S. Pitts | Vice Pres. and Sect. |
| Maury Jackson | Cashier and Auditor |
| Evelyn Perry | Asst. Cashier |

that a copy, which is correctly shown as I-65-Q-3?

A Yes, it is.

Q All right, sir. All right, sir. Now, then I ask you to look at that--let me ask--let me hand you something here before we go any further. I want to hand to you, Mr. Quaif, a document which has been identified as 10190-Q-3-A, and I'll ask you, if right below your letter of October 10th, if you don't have a copy of that?

A Yes, sir. There appears to be a copy there.

Q Is 10190-Q-3-A and Q-3-B, and Q-3-C, and Q-3-D the four pages that you have--are they exact copies of the four pages you have in your file, that you received from Tony Brothers Bank, regarding the renewal application?

A Yes, sir.

Q All right, sir. Do you have one of these?

A No, sir.

Q All right, sir. If you will, put those with your papers over there. Now, with regard to--going back to your file copy, sir, Mr. Quaif. In regard to the answer of question nine (9), is there any answer to that question on that renewal application, which you have identified as Q-3-A?

A No, sir.

Q Now, I wish you would look at your policy file, in your renewal file, please, sir, and if you would see if you can find a copy of that same page in your policy. All

right, sir. Now, there's a renewal application in your policy, which is attached to the policy in your file, is it the same as the one that's shown in your--in your correspondence copy; and which is shown as Q-3-A?

A Apparently the same, except for the date shown in item nine (9).

Q And, what is the date shown in item nine (9)?

A 1777 (sic).

Q Is that, 1/7/77?

A Correct.

Q Did you insert that in there?

A No, sir.

Q Did anyone in your office, under your supervision, insert that in there?

A No, sir.

Q Do you know who did insert that in there?

A No, sir.

Q Sir, did you send the application to National Union in its form as it is shown in your file, or as it's in the policy?

A I have to assume, as it's in the file, because that's the one to which my letter was attached.

Q All right, sir. And, the one to which your letter is attached, is identical to Q-3-A?

A Yes, sir.

Q And, on that Q-3-A, the answer to number nine (9) is blank?

A Correct, sir.

Q And, on the policy the answer to number nine (9) is--has been added, 1/7/77?

A Correct.

Q Okay. Did National Union Fire Insurance Company ever send that application back to you for sending back to Moultrie, or to Doerun, Georgia?

A I don't know, sir, without checking, but I have no recollection of it. I have no record of any such transaction, no, sir.

Q All right, sir. Thank you. Now, if you would, Mr. Quaif, would you look at I-73-Q-1. Is that the handwriting of anyone in your office?

A No, sir.

Q All right, sir. Would you look at Q-5, please, sir. Is that the handwriting of anyone in your office?

A No, sir.

Q All right. Q-6, was that sent to you, or do you have any knowledge of that?

A No, sir. I've never seen it before.

Q All right, sir. Q-7, have you ever seen Q-7, and 8 before?

A Well, it's addressed to me so I assume--yes, I

# NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

A CAPITAL STOCK COMPANY

102 MAIDEN LANE, NEW YORK, N. Y. 10005

## DIRECTORS AND OFFICERS LEGAL LIABILITY RENEWAL APPLICATION

Renal
Policy # 3842161
Dec 1, 1977-78

1. (a) Corporation Name— Tenco Brothers Bank
   (b) State of Incorporation— Ga.
   (c) State of Principal operation— Ga.

2. Address: PO Box 68
   Decatur, Ga. 31744

3. Amount of Insurance presently carried $ 1,000,000 Retention $ 5,000

   (a) Amount of Insurance desired on renewal: Same Self Insured Retention $_____

4. Annual copies of latest Annual Report

5. If there has been a change, copy (Certified by Corporate Secretary) of the indemnification provision in the By-Laws

6. Complete list of all subsidiary corporations and percentage owned.

   None

7. Complete list of all Directors of parent company by name and affiliation with other Corporations

   See schedule 1

8. Complete list of all Officers of parent company by name and affiliation with other Corporations

   See schedule 2

9. It is agreed that this renewal application is a supplement to the application completed on _____ and that application together with this renewal supplement constitute the complete application that shall be the basis of the contract and will be attached to and form part of the policy.

10. It is agreed that the Corporation will file with National Union Fire Insurance Company of Pittsburgh, Pa., as soon as the same became available, a copy of each registration statement and annual or interim report which the Corporation may from time to time file with the Securities and Exchange Commission.

Form 8953

20190-G-3.0

A-53

THE UNDERSIGNED AUTHORIZED OFFICER OF THE CORPORATION DECLARES THAT TO THE BEST OF HIS KNOWLEDGE THE STATEMENTS SET FORTH ARE TRUE.

SIGNING OF THIS APPLICATION DOES NOT BIND THE UNDERSIGNED TO COMPLETE THE INSURANCE BUT IT IS AGREED THAT THIS FORM SHALL BE THE BASIS OF THE CONTRACT SHOULD A POLICY BE ISSUED AND IT WILL BE ATTACHED TO THE POLICY.

TONEY BROTHERS BANK
Byron, Georgia

Signed By: _____ PRESIDENT

Attest _____ Title PRESIDENT

_____ CASHIER

Corporation Toney Brothers Bank

Broker _____

Date 9-22-77

(Corporate Seal)

Address _____

IF AN ORDER IS RECEIVED THE APPLICATION IS ATTACHED TO THE POLICY SO IT IS NECESSARY THAT ALL QUESTIONS BE ANSWERED IN DETAIL.

Form 391

20191-G-3-B

A-54

Toney Brothers Bank

Sept. 26, 1977

Schedule 1

| | |
|---|---|
| F. Donal Brown- | President, Brown Milling Co. |
| A.T. Knight | Toney Brothers Bank |
| Fred Park | Owner- Fred Park Department Store |
| Rance J. Taylor | Farmer |
| Wm. L. Taylor | Toney Bros. Enterprises |
| Charles Everett | Farmer |
| A. H. Fussell | Livestock grower |

Schedule 2

| | |
|---|---|
| F. Donald Brown- | Chairman of the Board |
| A.T. Knight | President and Chief Executive Officer |
| Marguerite S. Pitts | Vice Pres. and Sect. |
| Henry Jackson | Cashier and Auditor |
| Evelyn Perry | Asst. Cashier |

20192-Q-3-C

MUNICIPAL BOND QUESTIONNAIRE

1. The total investments in municipal bonds found in banks investment portfolio.

$245,839.75

2. Total dollar amount of any municipal bonds purchased in the past six months.

None

3. Any New York City or New York State bonds purchased in the past six months. None

4. Total dollar amount of New York City or New York State bonds purchased at any time in investment portfolio.

None

IF YOU ANSWER "YES" TO QUESTION #3 or #4, WE ALSO MUST KNOW THE PURCHASE DATE, MATURITY DATE AND PAR VALUE OF BONDS.

None

5. Are there any bond holdings or securities in the banks' portfolio that are currently in default? If so, please advise details and date they went into default.

None

SPECIAL RISKS
SURPLUS LINES

# OVERSEAS & DOMESTIC UNDERWRITERS, LTD.

October 10, 1977

Mr. Charles N. Carmichael
Financial Services Manager
National Union Fire Ins. Co.
1819 Peachtree Road, N.E.
Atlanta, Georgia 30309

Re: Toney Brothers Bank
Renewal of Policy 384 21 61

Dear Charlie:

In response to your letter of September 1st, I am now enclosing a completed application and relevant financial information as requested.

In quoting the renewal please offer a supplementary quotation for ransom and kidnap insurance on the individuals shown in Schedule 2 attached to the application.

Sincerely,

Alan S. Quale

ASQ:dtk

Enclosure

I-65

A-57

DIRECTORS AND OFFICERS LIABILITY DEPARTMENT

Date 10/12/77

To: Ms. Lydia Kerr
Financial Services Department
A.I.G., New York

From: C. Carmichael

Re: Toney Bedding Group #334-21-61

PLEASE REVIEW THE ATTACHED DATA AND ADVISE US REGARDING A QUOTE.
WE NEED THIS BY 11/1/77 Expires 12/1/77

INFORMATION IS ATTACHED, AS FOLLOWS:

| BANK OR FINANCIAL INSTITUTION | CORPORATE |
|---|---|
| ✓ Application | _____ Application |
| ✓ Latest Annual Report (to include Analysis of Reserve for Bad Debts) | _____ Latest Annual Report |
| ✓ Latest Interim Balance Sheet | _____ Interims |
| _____ Latest Interim Income Sheet | _____ 10-K |
| _____ Latest Interim Analysis of Reserve for Bad Debts | _____ D & B |
| ✓ Municipal Bond Information | _____ By-Laws |
| _____ Loans to REITS | |
| _____ Loans to D & O's | |
| _____ By Laws (Indemnification) | |
| _____ 10-K (if applicable) | |
| _____ Details on subsidiaries (where applicable) | |

ADDITIONAL COMMENTS/RECOMMENDATIONS Current coverage from 3/31/77
Persons Bank did not have a Pension Plan. I
have asked for 6/30 audits & 9/30 income
statements which shall be mailed to you later.

BROKER Corporate Domestic Underw., Inc.
3376 Peachtree Rd, NE Atlanta
BROKERS ADDRESS Atlanta, Ga. 30326 Financial Services

I-73-Q

American International Companies

DATE 10/12/77

TO Mr. Alan S. Quaif
FROM Chas. Carmichael

AT Overseas & Domestic (Department, Branch or Company)
AT AIG-Atlanta (Department, Branch or Company)

SUBJECT Toney Bros. Bank # 384-21-61

MESSAGE

Dear Alan,

Thank you for your letter and renewal data of October 10, 1977. I am enclosing several applications for your use so that we may consider the other coverages mentioned in your letter.

In addition, we need to see the 6/30 and 9/30/77 income statement of the Bank - this for the D&O renewal consideration.

Yours truly,
Charlie

REPLY IN THIS SECTION — DO IT NOW

TO _____ DATE _____

SIGNATURE _____

DO NOT SNAP AWAY CARBON
DETACH CANARY - FORWARD WHITE AND PINK
Form 9044 (10/75)

WHEN REPLYING DETACH CARBON - RETURN WHITE COPY
RETAIN PINK COPY FOR RECORD

I-72-

DETACH THIS COPY

A-59

TWX 11/2/1977

TO CARMICHAEL

FRM KAX

TONEY BROTHERS BANK-R/N D AND O 384 -21-61

-EXP 12/1/77 QUOTE SUBJECT TO

(1) SCHEDULE OF LOANSTO D ANS O'S

1,000,000 5,000/20,000/20,000 SIR PREM DLRS 6,500

-1YR

STANDARD 7 ENDORSEMENTS

PENDING AND PRIOR (12/1/76

C.C AND D (95-0/0)

ONE INSURED VS. ANOTHER

90 DAY DISCOVERY

I-75-Q

A-60

American International Companies
ATLANTA BRANCH OFFICE
1819 Peachtree Road, N.E.
Atlanta, Georgia 30309
404/351-9550

November 2, 1977

DIRECTORS AND OFFICERS LIABILITY

Mr. Alan S. Quaif
Overseas & Domestic Underwriters
3376 Peachtree Rd., N.E.
Atlanta, Ga. 30326

RE: TONEY PRO[illegible]
Renewal o[illegible], 61
Expire[illegible]

Dear Alan:

In accordance with your request for a "Directors and Officers Liability" quotation and based on the information submitted, we are pleased to offer the following proposal:

| LIMIT OF LIABILITY (Inclusive of Defense Cost, Charges & Expenses) | RETENTION (Each Loss) | PREMIUM (3 Yrs. Prepaid) ONE YEAR ONLY | PREMIUM (3 Yrs. Annual Installments) |
|---|---|---|---|
| $1,000,000. | $5,000. Ea. Director or Officer | $6,500. | |
| | $20,000. Aggregate Director or Offi[illegible] | | |
| | $20,000. Corporate Reimbursement | | |

SEE THE FOLLOWING CONDITIONS

I-66-Q



A-61

The above proposal(s) is/are inclusive of the following:

1. Coverage will apply to the Parent Company and all majority controlled subsidiaries, unless otherwise indicated.
2. Exclusion of all pending and prior litigation as well as all future losses based upon claims arising out of said pending and prior litigation, backdated to 1
3. Broad Form Nuclear Energy Liability Exclusion.
4. E.R.I.S.A. Exclusion.
5. Pollution and Contamination Exclusion.
6. Commissions Exclusion.
7. B.I./P.D. Endorsement.
8. 90 Day Discovery.
9. Exclusion of claims arising out of one insured vs. another.
10. Policy to include 5% participation on part of Insured.

c SUBJECT TO:
(1.) Schedule of loans to D & O's.

The proposal(s) is/are also subject to Insurance Department Approval and will expire [redacted] 12/1/77.

The Commission payable is 15 %.

Even though this is a difficult class of business at this time, we are pleased to furnish this proposal. If you control the Insured's other lines, we would very much like to have the opportunity to underwrite the Property, Inland Marine, Life, Group Travel Accident and Voluntary Travel Accident coverage.

We thank you for the opportunity to quote and look forward to being of service to you in the near future.

Very truly yours,

E. C. Sullivan
Underwriter
Financial Services Division

I-C7-Q
A-6

## REQUIRED UNDERWRITING INFORMATION

The following information is required on all Directors & Officers risks for both new lines and renewals.

Main Corps., Small Corps., Non-Profit

1. Application

The application is the most important underwriting information that an Underwriter has at his disposal, particularly the questions concerning claims and litigation and the overall warranties contained within. A copy of the application is attached to all issued policies and as the Declarations page states, is considered a part of the contract. Any D&O proposals offered are predicated upon our receiving a "Satisfactorily" completed application and no coverage should be bound without such application in hand. The application must be dated and signed by an individual whose position is that of an Executive Officer or higher. The application must contain an original signature and not a photocopy. The date the application was signed must be fairly recent in order to be satisfactory for binding and/or issuance purposes. The Underwriter must pay particular attention to any application received that has been amended by the broker or the Insured. Very often these amendments are an attempt to obtain either severability or continuity of coverage. In situations such as this, the application would not be acceptable and a new "unamended" application must be requested. All the questions contained within the application must be answered. Frequently the answers to the claims and litigation questions are lengthy and exceed the space allotted by the application thereby forcing the individual completing the application to answer the question more fully with an attached statement. In issuing a policy with an application containing such attachments, the Underwriter must have a copy of the attachments included with each copy of the policy.

We currently use four National Union applications: 8760 for Main and Small Corporations; 8759 for Non-Profit Organizations; 8761 for Financial Institutions;



EXHIBIT "E"

and 8853 for Renewals. It is important to note that f9 of the 8853 renewal application must be completed with a date in order that the warranties and statements contained within the application attached to the Insured's original policy are maintained on the renewal policy.

2. A Copy of the Latest Audited Annual Report

The Annual Report normally includes an overall operational review and a detailed financial review of the company for the last two fiscal years including Balance Sheets, Earnings Statements and Interpretive Notes. Very often a message or report to the shareholders from the president or chairman of the board will be included.

3. A Copy of the Latest Interim Report

Depending upon the anniversary date of the annual report submitted, it might be possible to obtain a copy of any subsequently issued interim reports which are issued on either a quarterly or monthly basis.

4. A Copy of the Latest 10K Report

Any publicly traded corporation is required to file an annual report with the Securities and Exchange Commission known as a 10K. This is usually a lengthy report which is useful in reviewing the operations (Item 1), the major shareholders and a listing of subsidiaries including the percentage of ownership (Item 4) and current litigation (Item 5).

5. A Copy of the Indemnification Clause

Although we normally only require a copy of the Indemnification Clause that is contained within the By-laws, sometimes a complete copy of the By-laws is needed in order to determine whether a company is profit making or non-profit, or how the Directors or Officers are appointed or elected, or whether there is any governmental or political control or relationship.

6. Dun & Bradstreet Report

A D&B Report should be ordered for each profit making corporation. It is the

EXHIBIT NO. D&O IN: 00005

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
NOV 15 1982

A.T. KNIGHT, G. GERALD KUNES, and KUNES & KUNES,

Plaintiff-Appellants,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. and TONEY BROTHERS BANK,

Defendants-Appellees.

Civil Action No. 81-7865

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that A.T. KNIGHT, et al, the Plaintiffs, above named, hereby appeal to the Supreme Court of the United States from the Summary Judgment entered in this action on the 6th day of October, 1981, and the Judgment, dated August 20, 1982, of the United States Court of Appeals for the Eleventh Circuit, affirming the District Court Judgment, and the Order of October 18, 1982 of the United States Court of Appeals for the Eleventh Circuit denying a Motion for Rehearing in this cause.

This appeal is taken pursuant to 28 U.S.C. §1254.

This the 11th day of November, 1982.

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NO. 82-1234

IN THE

# Supreme Court of the United States

OCTOBER TERM 1982

A. T. KNIGHT, G. GERALD KUNES
AND KUNES & KUNES,

*Petitioners,*

VERSUS

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.
AND TONEY BROTHERS BANK,

*Respondents.*

## BRIEF OF RESPONDENT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court for the Northern District of Georgia erred in granting summary judgment to National Union Fire Insurance Company of Pittsburgh, Pennsylvania.

2. Whether this case merits discretionary review by the Supreme Court under the guidelines set forth in Supreme Court Rule 17.

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## STATUTES AND RULES INVOLVED

1. Official Code of Georgia § 33-24-7 [Ga. Code Ann. § 56-2409] which, in its entirety provides as follows:

> (a) All statements and descriptions in any application for an insurance policy or annuity contract or in negotiations for such, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties.
>
> (b) Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:
>
> (1) Fraudulent;
> (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
> (3) The insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the premium rate as applied for or would not have provided

coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.

2. Federal Rule of Civil Procedure 56(b), (c) and (e) which provide as follows:

> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond,

summary judgment, if appropriate, shall be entered against him.

3. United States Court of Appeals for the Eleventh Circuit Rule 23(b) which provides as follows:

> (b) When a panel of judges of the court unanimously determines, after an examination of the briefs and records, that a case falls within one of the three categories of FRAP 34(a):
>
> (1) the appeal is frivolous, or
>
> (2) the dispositive issue or set of issues has been recently or authoritatively determined, or
>
> (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process will not be significantly aided by oral argument,
>
> the case will be placed on the non-argument calendar for submission and decision without oral argument. If at any time before decision a judge on the nonargument panel concludes that oral argument is desired, the case will be transferred to the oral argument calendar. Except as provided in subparagraph (c) of this

rule, decision of a non-argument case must be unanimous, and no dissenting or special concurring opinion may be filed; otherwise the case is transferred to the oral argument calendar.

4. United States Court of Appeals for the Eleventh Circuit Rule 25 which provides as follows:

> When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is not insufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) summary judgment, directed verdict or judgment on the pleadings is supported by the record;
>
> and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

## STATEMENT OF THE CASE

On February 27, 1976, the Georgia Department of Banking and Finance issued a Cease and Desist Order to Toney Brothers Bank. On March 12, 1976, petitioner Knight, who at all times relevant hereto was an officer and director of Toney Brothers Bank, acknowledged receipt of the Cease and Desist Order by letter to the Department of Banking and Finance. On March 18, 1976, Knight also notified the Hartford Accident and Indemnity Company, which had issued a blanket bankers bond to Toney Brothers Bank, of the existence of the Cease and Desist Order. Upon receiving that notice, Hartford immediately cancelled the bankers blanket bond.

On August 3, 1976, petitioner Knight, acting as President of Toney

Brothers Bank, prepared and submitted to respondent National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") an application for Directors and Officers Legal Liability Coverage. On January 7, 1977, Knight prepared and filed a second application on an identical form with National Union. Both applications were signed by Knight personally, and each contained, as Question 14, the following: "Has this Financial Institution ever received a Cease and Desist Order from any Supervisory Authority? If so, give details." On both applications Knight responded "No." That representation was false and was known by Knight to be false as is shown by the fact that he had twice acknowledged existence of the Cease and Desist Order in writing.

National Union issued Directors and Officers Liability and Corporation Reimbursement Policy No. 304 21 61, effective December 1, 1976 to December 1, 1977, in reliance on the information contained in the application dated January 7, 1977. Toney Brothers Bank never filed any claim with National Union under that policy.

On September 26, 1977, Knight, acting as President of Toney Brothers Bank, submitted a renewal application (the "Renewal Application") on behalf of the Bank to National Union. Paragraph 9 of that application read as follows:

> It is agreed that this renewal application is a supplement to the application completed on _____ and that application together with this renewal supplement constitute the complete application that shall be the basis of the contract and will be attached to and form part of the policy.

In reliance on the representations made in the Renewal Application and the initial applications, National Union issued to Toney Brothers Bank the policy at issue in this case which is Policy No. 651 71 27 (the "Renewal Policy"), which was to have been effective from December 1, 1977 to December 1, 1978. When the Renewal Policy was issued, the Renewal Application was attached to it and the blank in paragraph 9 quoted above had been completed by insertion of "1/7/77" referring to the earlier application of January 7, 1977. The Renewal Policy was accepted by the Bank as issued, and neither petitioner Knight nor the Bank objected to the insertion of the date of the original application in paragraph 9 of the Renewal Application.

On October 18, 1978, Knight employed petitioner G. Gerald Kunes and Kunes & Kunes to represent him in defense of a lawsuit brought against Knight, National Union and another director of Toney Brothers Bank by two stockholders of the Bank. Kunes had been Knight's personal lawyer for several years, and later also represented him in defense of other lawsuits concerning his handling of Bank affairs.

On November 2, 1978, by letter from its counsel to Toney Brothers Bank, National Union notified the Bank of its decision to treat the Renewal Policy as void ab initio on the basis of material misrepresentations in the application forms signed by Knight and dated January 7, 1977, and September 26, 1977. National Union enclosed with that letter a check in the amount of $13,574.00 representing

a return of the premiums paid on both the original policy and the Renewal Policy, with interest. Tender of that check was initially refused by Toney Brothers Bank. The Bank later failed and was taken over by the Federal Deposit Insurance Corporation which subsequently, acting on behalf of the Bank as Receiver, did accept the check in return of the premiums and interest.

On October 6, 1981, the United States District Court for the Northern District of Georgia, Atlanta Division, granted respondent's motion for summary judgment. Petitioners appealed the judgment of the district court to the United States Court of Appeals for the Eleventh Circuit which assigned the case to its nonargument calendar and affirmed, without opinion, on August 20, 1982. Thereafter

petitioners filed a petition for a rehearing in the United States Court of Appeals for the Eleventh Circuit which was denied, without opinion, on October 18, 1982. Petitioners now seek a Writ of Certiorari from this Honorable Court to the United States Court of Appeals for the Eleventh Circuit.

## SUMMARY OF ARGUMENT

The insurance policy in question, National Union Directors and Officers Liability and Corporation Reimbursement Policy No. 651 71 27, was issued in reliance on a material misrepresentation made in applications for insurance prepared and signed by petitioner Knight personally. Upon learning of the existence of the material misrepresentation, National Union promptly declared the policy in question void ab initio as it was entitled to do pursuant to applicable Georgia law. National Union did not at any time waive its right to declare the policy void, nor is it estopped from so doing by any reason. There is no genuine issue as to any material fact, and National Union is entitled to judgment in its favor as a matter of law. Therefore, the United

States District Court for the Northern District of Georgia, Atlanta Division, properly granted National Union's motion for summary judgment.

Secondly, it is respectfully submitted that this case is not appropriate for review on writ of certiorari pursuant to the considerations set forth in Rule 17 of this Honorable Court.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

## ARGUMENT

1. THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA CORRECTLY GRANTED THE MOTION OF NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA FOR SUMMARY JUDGMENT.

National Union's motion for summary judgment was based primarily upon a statute which, in pertinent part, provides as follows:

> Misrepresentations, omissions, concealment of facts, and incorrect statements [in an application for insurance] shall not prevent a recovery under the policy or contract unless:
>
> (1) Fraudulent;
> (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
> (3) The insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the premium rate as applied for or

would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.

Official Code of Georgia, § 33-24-7(b) [Ga. Code Ann. § 56-2409(b)][1]

***

[1]At the time when the district court granted National Union's motion for summary judgment the official codification of Georgia's statutory laws was known as Georgia Code Annotated, and all citations to Georgia statutes contained in the Order of October 6, 1981 granting that motion are to Georgia Code Annotated. Pursuant to a subsequent recodification, Georgia statutes are now properly referred to as they are codified in the Official Code of Georgia. For the convenience of the Court, citations herein to Georgia statutes will be to the Official Code of Georgia with the corresponding provisions of the Georgia Code Annotated appearing immediately thereafter in brackets.

Petitioners have never disputed that petitioner Knight's response to question 14 on the August 3, 1976 and January 7, 1977 applications was a misrepresentation. A Cease and Desist Order had been issued to Toney Brothers Bank by the Georgia Department of Banking and Finance on February 27, 1976, and was in effect when Knight filed those applications for insurance. It is also clear that Knight was aware of the existence of the Cease and Desist Order since he had acknowledged its receipt in writing to the Department of Banking and Finance and had notified Hartford Accident and Indemnity Company, which had issued a bankers blanket bond to the Bank, of the issuance of the Order. Nevertheless, in both the August 3, 1976 and January 7, 1977 applications, Knight represented to National Union that no Cease and Desist

Order had ever been issued to Toney Brothers Bank.

The district court properly found that the courts of Georgia are not reluctant to decide that misrepresentations are material as a matter of law if the evidence excludes every reasonable inference except that a misrepresentation is material. United Family Life Ins. Co. v. Shirley, 242 Ga. 235, 236, 248 S.E.2d 635 (1978); New York Life Ins. Co. v. Schneider, 155 Ga. App. 768, 770-71, 272 S.E.2d 739 (1980); Prudential Ins. Co. v. Perry, 121 Ga. App. 618, 626-27, 174 S.E.2d 570 (1970) and cases cited therein. See also Davis v. Integon Life Ins. Corp., 645 F.2d 494, 498 (5th Cir. 1981).

In support of its motion for summary judgment, National Union presented an affidavit of the underwriter

principally responsible for the consideration of Toney Brothers Banks' initial application who testified that the existence of the Cease and Desist Order "shows that Toney Brothers Bank constituted a significantly greater risk than was indicated by the January 7, 1977 application," and that National Union would not have issued the initial policy had it known about that Order. Affidavit of David Ratner dated April 27, 1981 at ¶ 7. National Union's Senior Vice President in charge of the Underwriting Department also testified by affidavit that "there is a much greater risk or hazard in insuring financial institutions and the officers and directors of financial institutions who have a history of economic and regulatory problems." Affidavit of Christopher Cavallaro dated April 29, 1981 at ¶ 3. Cavallaro

further testified that "it would be contrary to the underwriting standards applied by National Union Fire Insurance Company of Pittsburgh, Pa. to issue a directors and officers liability policy such as the policy issued to Toney Brothers Bank to a financial institution having the problems indicated in the Cease and Desist Order." Id. at ¶ 7. Furthermore, the official of Hartford Accident and Indemnity Company who made the decision to cancel the bankers blanket bond issued to Toney Brothers Bank upon receipt of notification of the issuance of the Cease and Desist Order testified on deposition that he did so because the Order "highlights a bad situation in any bank." Deposition of William Driscoll, p. 11. Finally, the Director of Bank Supervision of the Georgia Department of Banking

and Finance testified by deposition that the issuance of a Cease and Desist Order by his department is not a commonplace event, is a matter of great seriousness, and represents "the strongest and the ultimate device that a regulatory agency has in its supervision of a bank." Deposition of John B. Kline, pp. 43 and 69.

Petitioners presented no evidence whatsoever to controvert the testimony of Ratner, Cavallaro, Driscoll and Kline referenced above, and accordingly the district court properly found, as a matter of law, that the negative response to question 14 on the applications of August 3, 1976 and January 7, 1977 was a material misrepresentation.

The district court also properly found that, even taking as true Knight's allegation that he did not insert the date "1/7/77" in the blank provided in

paragraph 9 of the Renewal Application, petitioners cannot benefit thereby for two separate and independent reasons. First, by signing the Renewal Application, Knight agreed on behalf of the Bank that some application completed at some earlier time would constitute part of the Renewal Application and would form a part of the Renewal Policy. The applications dated August 3, 1976 and January 7, 1977 were the only other applications ever filed with National Union by the Bank, and those applications contain identical material misrepresentations. Accordingly, Knight knew when he filed the Renewal Application that National Union was relying on one or both of those previous applications, complete with material misrepresentations, in issuing the Renewal Policy.

Secondly, the evidence is undisputed that when the Renewal Policy was issued, a copy of the Renewal Application was attached to it and the date "1/7/77" had been inserted in the blank in paragraph 9 thereof. Neither Knight nor Toney Brothers Bank, however, ever objected to that fact. Under Georgia law an insured has a duty to examine the insurance contract and renegotiate the unacceptable terms because the insured will be bound by the terms of the contract. Barnes v. Mangham, 153 Ga. App. 540, 265 S.E.2d 867 (1980); Georgia Mutual Ins. Co. v. Meadors, 138 Ga. App. 486, 487, 226 S.E.2d 318 (1976); Parris & Son, Inc. v. Campbell, 128 Ga. App. 165, 173-74, 196 S.E.2d 334 (1973).

The district court also properly found the various arguments raised by

petitioners regarding waiver and estoppel to be without merit, even when all factual allegations are construed in the light most favorable to petitioners. Under Georgia law it is clear that an insurer will be estopped from denying coverage only where the insurer, with knowledge of a ground of noncoverage, assumes and conducts the defense of an action brought against the insured. Jones v. Georgia Casualty & Surety Co., 89 Ga. App. 181, 185-86, 78 S.E.2d 861 (1953); Richmond v. Georgia Farm Bureau Mutual Ins. Co., 140 Ga. App. 215, 217, 231 S.E.2d 245 (1976); Gant v. State Farm Mutual Automobile Ins. Co., 109 Ga. App. 41, 43, 134 S.E.2d 886 (1964); State Farm Mutual Automobile Ins. Co. v. Anderson, 104 Ga. App. 815, 818, 123 S.E.2d 191 (1961). The evidence at bar is clear

that National Union never assumed nor conducted the defense of petitioner Knight, and thus, even if the allegations of Knight regarding National Union's consenting to his employment of Kunes as defense counsel are true, National Union is not estopped from denying coverage. Furthermore, petitioners did not present any evidence to suggest that the defense of Knight was in any way affected by National Union's alleged authorization to him to employ Kunes as defense counsel or the alleged withdrawal of that authorization two weeks later. Finally, under Georgia law it is clear that estoppel cannot be used to create coverage where none ever existed. McGhee v. Independent Life and Accident Ins. Co., 146 Ga. App. 310, 311, 246 S.E.2d 349 (1978); Ballinger v. C&S Bank, 139 Ga. App. 686, 689, 229 S.E.2d 498, 501 (1976); Keaten

v. Paul Revere Life Ins. Co., 648 F.2d 299, 304 (5th Cir. 1981) and cases cited therein.

It is undisputed that Knight completed and filed both the August 1976 and January 1977 applications after issuance of the Cease and Desist Order to Toney Brothers Bank and after he had twice acknowledged its existence in writing. That he well understood its importance is proven by the fact that Hartford Accident and Indemnity Company cancelled its bankers blanket bond to Toney Brothers Bank immediately after receiving notice of that Order. Thus petitioner Knight, personally, knowingly and falsely represented that no Cease and Desist Order had issued against Toney Brothers Bank. That misrepresentation was material and fraudulent.

The policy issued on the basis of that misrepresentation and the Renewal Policy which incorporated the application containing that misrepresentation were thus void ab initio under Georgia law, and the district court was correct in granting plaintiff's motion for summary judgment.

2. THIS CASE DOES NOT MERIT DISCRETIONARY REVIEW BY THE SUPREME COURT UNDER THE GUIDELINES SET FORTH IN SUPREME COURT RULE 17.

This case involves a dispute between an insurer and an insured regarding whether coverage is provided under a certain policy of insurance. No federal question is involved. Furthermore, the facts and law so clearly demand judgment in favor of National Union that not only did the United States

District Court for the Northern District of Georgia grant National Union's motion for summary judgment, but the United States Court of Appeals for the Eleventh Circuit placed the case on its non-argument calendar pursuant to Rule 23 of that Court, even though petitioners requested oral argument. Pursuant to Eleventh Circuit Rule 23, placement on the non-argument calendar indicates that a panel of judges of that Court unanimously determined, after an examination of the briefs and record, either that the case was frivolous, the dispositive issue or set of issues had been recently or authoritatively determined, or that the facts and legal arguments were adequately presented in the briefs and record and that the decisional process would not be

significantly aided by oral argument. Furthermore, the Eleventh Circuit affirmed the summary judgment without opinion, pursuant to Rule 25 of that Court, indicating that the summary judgment was found to be supported by the record and that the Court determined that no error of law appears and an opinion would have had no precedential value.

Supreme Court Rule 17 sets forth certain considerations which govern review on certiorari and which make it clear that such review is not a matter of right, but of sound judicial discretion which will be granted only when there are special and important reasons therefor. Respondent respectfully submits that, since there is no federal question involved in this case and petitioners have not demonstrated

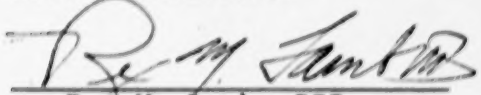
any special or important reasons why the writ of certiorari should be granted, this case is not appropriate for review by this Honorable Court.

## CONCLUSION

For the reasons set forth herein, respondent National Union Fire Insurance Company of Pittsburgh, Pennsylvania respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

HURT, RICHARDSON, GARNER,
TODD & CADENHEAD



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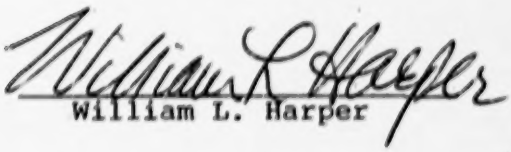

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